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In the

United States Court of Appeals

For the Seventh Circuit

No. 12041

EICHBERG & COMPANY, INC.,
Plaintiff Appellant,

vs.

VAN ORMAN FORT WAYNE CORPORATION,
Defendant Appellee.

Appeal from the United State District Court for the Northern District of Indiana, Fort Wayne Division.

Honorable
Luther M. Swygert,
Trial Judge.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT.

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EICHBERG & COMPANY, INC., *Plaintiff-Appellant,* vs. VAN ORMAN FORT WAYNE CORPORATION, *Defendant-Appellee.*	Appeal from the United State District Court for the Northern District of Indiana, Fort Wayne Division. Honorable **Luther M. Swygert,** Trial Judge.

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

This action was brought to recover damages occasioned by the failure of the defendant hotel to return property of the plaintiff which had been deposited with it for safe-keeping in a vault. The complaint charged two separate causes of action: First, a common law action against a bailee for hire for failure to deliver the bailed property on demand, and Second, a common law action of deceit

founded upon an innkeeper's misrepresentation that it would put the bailed property in its vault for safekeeping when in truth and in fact there was no such vault and there was never any intention to place the property in a vault. (A. 1-3, 6-8.)

One Edmund J. Danziger, a salesman for plaintiff, reserved a room for the night of October 25 to 26, 1954, at the defendant's Fort Wayne hotel. On the afternoon of October 25, he drove to this hotel and gave the doorman his personal bag, but refused to surrender possession of two other bags containing jewelry and valuables belonging to the plaintiff worth Twenty-Nine Thousand Six Hundred Forty-Six Dollars and Fifty Cents ($29,646.50).

He went through the door and was met by the bellman. He again refused to surrender possession of the sample cases and took them with him to the desk where he registered. (A. 37-40.) The room clerk knew that he was a jewelry salesman. (A. 28-29.) While registering, he kept the sample cases between his legs so no one could switch them on him. (A. 58.)

The registration card stated: "A safe is provided for the deposit of money, jewelry, and other valuables. This hotel will not be responsible for valuables not deposited." (P. Ex. 6.) There was no limitation placed on this card as to the value or size of the property the defendant would accept for safekeeping. No such notice was posted at the place of registration or in each guest room as required by the Act purporting to limit the liability of innkeepers.

The defendant uses the same registration card at its Evansville hotel where the safe is large enough to hold cases of the type carried by Danziger. (A. 72.)

At Fort Wayne the safe referred to in this card would not hold plaintiff's property—a fact which it deliberately concealed from Danziger. (A. 41-2.)

The Fort Wayne hotel did have a regular checkroom for ordinary baggage and parcels. (A. 22.)

After he had registered, he advised an employee of the defendant hotel that he wanted the "two bags put in the vault." (A. 58.) The bellman procured from the cashier two "Safety Deposit Envelopes."

Mr. Danziger signed the "A Checks" on the "Safety Deposit Envelopes" at the place provided but did not state the value. This was in accordance with the defendant's established policy of not requesting guests to state the value of articles surrendered to it for safekeeping. (A. 22, 16-17.)

After the checks were signed, one envelope was placed around the handle of each bag and the receipts, "B Depositor's Check," were delivered to him. These receipts provided among other things that "Package will be delivered only to party originally depositing it, whose signature appears on duplicate check on package." The bellman then took the cases into a semi-public room next to the main desk. This was the place provided for "safety deposit." (A. 17, 22.) Danziger followed the bellman to the room and assumed that he was arranging for the cases to be put into the supposed vault according to instructions. (A. 53-4.)

The bellman, however, in accordance with the hotel's established practice placed the cases on the floor of the room for the night. He then came out of the room empty-handed and roomed Mr. Danziger.

There was no vault for the safekeeping of the plaintiff's goods. The defendant did not advise the plaintiff's salesman that there was no such vault. (A. 40-1.) He would not stay at a hotel which did not have proper facilities for the safekeeping of his merchandise and under no circumstances would he have permitted his cases to remain in the

place where they were put had he known the true facts. (A. 45.) He was a regular customer of the hotel and went there on this occasion in reliance on previous representations of the defendant hotel that his cases would be kept by it overnight in a safe. (A. 58.)

Mr. Danziger was an experienced and satisfactory employee. He was instructed never to leave his goods unprotected. Whenever he leaves them overnight, they must go into a bank vault or a jeweler's safe or in a safe. The penalty for breach of this rule is discharge. He was to stop at first-rate hotels which have safes. He never violated his instructions about protecting the plaintiff's property. (A. 24, 41.)

The room in which the plaintiff's valuables were placed for safekeeping was an office where a stenographer and other employees worked. It was open to and used by numerous other employees for business connected with the hotel or personal business such as the placing of private phone calls. (A. 71.) It was not even locked at night. No special safeguards were adopted to keep people generally from entering it. (A. 78.) None of these facts were known to Mr. Danziger. The defendant had been previously warned that it would get into trouble because it didn't have a vault at Fort Wayne. (A. 88.)

The next morning Mr. Danziger presented his Depositor's Checks and claimed his cases. They have never been produced.

All hotel employees carried out the instructions given them by management. This is not a case in which it is sought to hold an innkeeper liable for the misconduct of some servant or minor employee.

SUMMARY OF ARGUMENT.

The Innkeeper's Act does not apply to facts.

At common law an innkeeper is bound to account for goods deposited with him for safekeeping. Proof they were stolen is not a sufficient accounting.

At common law an innkeeper may not with impunity obtain possession of property upon a representation it has a safe for safekeeping when there is no safe. He is liable in an action of deceit.

If the Act destroys all common law liability of the innkeeper, it violates the Bill of Rights of Indiana by denying persons a remedy by due course of law for injury to property.

The Legislature cannot give a license to defraud. The Legislature cannot grant special privileges to innkeepers.

The title of the Act is not broad enough to cover the abolishing of a civil cause of action.

The Act does not apply to our facts because:

(1) The defendant failed to file the statutory notices.

(2) Sec. 1 does not apply because there was no safe.

(3) Sec. 3 does not apply because it does not apply to property bailed to the hotel.

(4) The Act does not protect an innkeeper from his own torts.

(5) The Safety Deposit Envelopes constituted a special agreement in writing to assume liability for the value of the property deposited.

The failure to make any finding on the second paragraph of complaint is not a finding against plaintiff and this Court may enter the appropriate judgment.

CONTESTED ISSUES.

The defendant contended and the Court below found, that it was not liable to the plaintiff because its conduct was protected by the Innkeeper's Act. The plaintiff contends that:

1. The Innkeeper's Act is unconstitutional under both the State and Federal constitutions.

2. The Innkeeper's Act does not give an innkeeper the right to defraud his guests.

3. The defendant had the burden of proving that the Innkeeper's Act protected it.

4. The Innkeeper's Act, by its very terms, does not apply to the facts found and proven by the undisputed evidence.

5. The plaintiff is entitled to a specific finding and decision on its second paragraph of complaint.

PROPOSITIONS OF LAW.

1.

At Common Law an innkeeper in Indiana must account for the loss of the property of his guest.

Laird v. *Eichold*, 10 Ind. 212, 213,
Bowell v. *DeWald*, 2 Ind. App. 303, 309.

2.

Proof of disappearance is not a satisfactory accounting.

Keenan Hotel Co. v. *Funk* (T. D. 1930), 93 Ind. App. 677; 177 N. E. 364.
Bowell v. *DeWald*, 2 Ind. App. 303.

3.

At Common Law an innkeeper may not defraud his guests with impunity.

Restatement, Torts, § 525, 538.

4.

The Legislature may not abolish these common law causes of action.

Sec. 12 and 23, Art. 1, Ind. Const.
Pennington v. Stewart, 212 Ind. 553, 10 N. E. 2d 619.
Warren v. Ind. Tel. Co., 217 Ind. 93; 26 N. E. 2d 399.
Heck v. *Schupp*, 394 Ill. 296; 68 N. E. 2d 464.
Lebohm v. *City of Galveston*, 154 Tex. 192; 275 S. W. 2d 951.

5.

The Legislature may not grant special immunity to an innkeeper.

Sec. 23, Art. 1 Ind. Const.
14th Amend. U. S. Const.
Hanley v. State, 234 Ind. 326; 123 N. E. 2d 452.
Opinion of Justices, 211 Mass. 618; 98 N. E. 337.
Park v. *Detroit Free Press*, 72 Mich. 560; 40 N. W. 731.
Allen v. *Pioneer Press*, 40 Minn. 117; 41 N. W. 936.
Byers v. *Meridian Printing Co.*, 86 Ohio St. 408; 95 N. E. 917.

6.

The Title to the Act does not permit it to abolish a civil cause of action.

State ex rel. v. *Beck*, 220 Ind. 276; 41 N. E. 2d 622.
Heck v. *Schupp*, 394 Ill. 296; 68 N. E. 2d 464.

7.

The failure of the defendant to post the statutory notices deprives it of the protection of the Act.

28 Am. Jur. 595.

8.

The defendant may not use the Act to shield itself against the consequences of its own torts.

32 C. J. 552.
28 Am. Jur. 591.
In re Brainard Hotel, 2 Cir., 75 F. 2d 481.
Goodwin v. *Georgian Hotel Co.*, 197 Wash. 173; 84 P. 2d 681.

9.

The burden is on the innkeeper to obtain a declaration of value. It is not negligence for a guest to fail to volunteer such information.

28 Am. Jur. 597.

Bowell v. *DeWald*, 2 Ind. App. 303, 309.

10.

Conditions on claim checks will not relieve a bailee for hire from the consequences of its own neglect.

W. U. Tel. Co. v. *Buchanan*, 35 Ind. 429.

Keenan Hotel Co. v. *Funk* (T. D. 1932), 93 Ind. App. 677; 177 N. E. 364.

11.

Failure to make any finding on second paragraph of complaint is not a finding against plaintiff.

Kweskin v. *Finkelstein*, 7 Cir. 223 F. 2d 677.

12.

The Innkeeper's Act should be construed so as to avoid deciding a constitutional question.

White v. *Sun Pub. Co.*, 164 Ind. 426, 430; 73 N. E. 890.

ARGUMENT.

Plaintiff's employee registered at the defendant's hotel in Fort Wayne upon a card which stated the following under his signature:

> "NOTICE TO GUESTS.
>
> A safe is provided for the deposit of money, jewelry, and other valuables. This hotel will not be responsible for valuables not deposited."

He asked to have plaintiff's cases put in the safe and the bellhop produced two "SAFETY DEPOSIT ENVELOPES". He signed the "A Check" and was given the "B Depositor's Check" which provided:

> "This check to be signed only when package is called for and in presence of the clerk on duty • • • Package will be delivered only to party originally depositing it, whose signature appears on duplicate check on package."

Under "DIRECTIONS" it is provided:

> "Packages too large for the envelope may be checked by detaching both coupon checks; follow signature directions as above; attach Check A to package, and give Check B to Depositor."

The bellhop took the two cases and placed them in a room which was open to the public and not even locked. There was no safe which could contain plaintiff's property. The hotel in accepting custody of plaintiff's property had absolutely no intention of placing the cases in any safe. Upon demand the following morning the hotel was unable to produce the cases.

This same registration card was used by the defendant at its hotel in Evansville, Indiana. There it had a vault which would accommodate these cases. (A. 72.) The manager of the Fort Wayne hotel had been warned "several times that he should get a safe." (A. 88.)

The employees at the hotel in following this procedure were carrying out the orders of their employer. We repeat this is not a case involving any misconduct by a servant or minor employee. At no time did the defendant hotel advise plaintiff's employee that it did not intend to put his cases in a safe, that the only safe it had was too small for his cases, that the servants of the defendant were not authorized to accept valuables beyond a certain amount, that there was any limit on their authority as to the size of the articles to be accepted or that these valuable cases would be placed in a room which was semi-open to the public.

The Court below made Conclusions of Law in favor of the defendant solely on the basis that the Innkeeper's Act protected it. The material portions, including the title are as follows:

> AN ACT Regarding the Liability of Hotels, Apartment Hotels and Inns and the Proprietors and Managers Thereof for Loss or Damage of the Property of Guests; and declaring an emergency.
>
> *Liability To Guests—Hotels, Apartment Hotels and Inns—Proprietors and Managers.*
>
> SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That whenever the proprietor or manager of any hotel, apartment hotel, or inn, shall provide a safe in a convenient place, for the safekeeping of any money, jewels, ornaments, furs, bank notes, bonds, negotiable security, or other valuable papers, precious stones, railroad tickets, articles of silver or gold, or other valuable property of small compass, belonging to or brought in by the guests of such hotel,

apartment hotel, or inn, and shall notify the guests thereof by posting a notice in a public and conspicuous place and manner at the place of registration of such hotel, or in each guest room, stating the fact that such safe place is provided in which such articles may be deposited, if such guest shall neglect or fail to deliver such property to the person in charge of such office for deposit in such safe, neither such hotel, apartment hotel, or inn, nor the proprietor nor manager thereof, shall be liable for any loss of or damage to any such property sustained by such guest, or other owner thereof, whether such loss or damage is occasioned by the neglect of such proprietor or manager or of his agents or otherwise. If such guests shall deliver such property to the person in charge of such office for deposit in such safe, such hotels, apartment hotels, or inns, or the manager or proprietor thereof, shall not be liable for the loss or damage of such property sustained by such guest or other owner thereof in any sum exceeding the sum of Six Hundred Dollars ($600.00), whether such loss or damage is occasioned by the negligence of such proprietor or manager or by his agents or otherwise, notwithstanding said property may be of greater value, unless such proprietor or manager shall have entered into a special agreement in writing agreeing to assume such additional liability.

Personal Property Other Than Merchandise—Checked Property—Liability.

SEC. 2. Except as provided for in the foregoing section the hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to personal property, other than merchandise samples or merchandise for sale, brought into such hotel, apartment hotel, or inn by any guest thereof, exceeding Two Hundred Dollars ($200.00) in value, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless such manager or proprietor shall have contracted in writing to assume greater liability. This limitation of liability shall apply also

with respect to the liability for the safekeeping of any luggage or other personal property left in any hotel, apartment hotel, or inn to be checked in any checkroom operated by such hotel, apartment hotel or inn, whether such luggage or other personal property is brought in by and belongs to a guest or to a person who is not a guest.

Merchandise—Liability.

SEC. 3. A hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to any merchandise samples or merchandise for sale, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless the guest or other owner shall have given prior written notice of having brought such merchandise into the hotel and of the value thereof, the receipt of such notice shall have been acknowledged in writing by the proprietor, manager or other agent and in no event shall such liability exceed the sum of Four Hundred Dollars ($400.00) unless the manager or proprietor of such hotel, apartment hotel, or inn shall have contracted in writing to assume a greater liability.

Property Left by Departed Guest—Liability.

SEC. 4. In case of loss or damage to any property left by a guest after he has departed from any hotel, apartment hotel or inn, and ceased to be a guest thereof, the liability of the proprietor shall be that of "gratuitous bailee", and in such case the extent of such liability shall be limited to not more than One Hundred Dollars ($100.00).

Guest's Property in Transit to or From Hotel—Liability.

SEC. 5. In case of loss of or damage to any property while in transit to or from any hotel, apartment hotel, or inn, on behalf of a guest thereof, the liability of the proprietor shall be limited to Two Hundred Dollars ($200.00), whether such loss or damage is occasioned

by the negligence of such proprietor or his agents, or otherwise, unless the guest shall have given prior written notice of the value thereof, the receipt of such notice shall have been acknowledged in writing by the proprietor, manager or other agent but in no event shall such liability exceed the sum of Four Hundred Dollars ($400.00), unless such proprietor shall have contracted in writing to assume a greater liability.

"Guest" Defined.

SEC. 6. "Guest" within the meaning of this Act shall include transient guest, permanent guest, tenant, lodger or boarder.

The preliminary portions of the Opinion, which are not a part of the findings, indicate that the Trial Court felt that Sec. 1 of the Act did not apply, because plaintiff's cases were not articles of small compass. This reasoning is contrary to the language of the statute, which includes articles such as "furs" (they would not fit in the Fort Wayne safe—A. 77), and to the facts found because the defendant accepted custody of the cases for safe deposit under the provisions of this section.

The Opinion bases the Conclusions of Law solely on Sec. 3 which limits or destroys liability for the loss of merchandise samples. The Court imposed on plaintiff the burden of escaping the provisions of that section. We submit that the Court erred in both conclusions.

In order to understand our position we will point out (A) that the facts found and proven by the undisputed evidence establishes the defendant's liability at the common law under both paragraphs of the complaint and (B) show why the Act does not control this case.

A.

The liability of an innkeeper for loss of the goods of his guest is stated in *Laird* v. *Eichold,* 1858, 10 Ind. 212, at 213, 215:

> "The authorities all agree that an innkeeper is prima facie liable for any loss or injury to the goods of his guest, not occasioned by the act of Providence, the public enemies, or the fault of the guest;"
>
> "Innkeepers, on grounds of public policy, are held to a strict accountability for the goods of their guests. The interests of the public, we think, are sufficiently subserved, by holding the innkeeper prima facie liable for the loss or injury of the goods of his guest; thus throwing the burden of proof upon him, to show that the injury or loss happened without any default whatever on his part, and that he exercised the strictest care and diligence. And it is more in accordance with the principles of natural justice, to permit him to exonerate himself by making such proof, than to shut the door against him, and hold him responsible for an accident happening entirely without his default, and against which strict care and prudence would not guard."

In *Keenan Hotel Company* v. *Funk,* T. D. den., 1932, 93 Ind. App. 677, 177 N. E. 364, the plaintiff paid a fee of 25¢ to store his automobile on the defendant's parking lot. On demand the automobile was not produced because it was stolen. After holding that conditions recited on the claim check "would not relieve appellant from liability if appellee's car was stolen from the parking lot through appellant's negligence," the Court holds that a mere showing that goods were stolen does not relieve a bailee for hire from liability, stating:

> "'The weight of modern authority holds the rule to be that where the bailor has shown that the goods were received in good condition by the bailee and were not returned to the bailor on demand the bailor

has made out a case of prima facie negligence against the bailee, and the bailee must show that the loss or damage was caused without his fault. * * * The effect of this rule is, not to shift the burden of proof from plaintiff to defendant but simply the burden of proceeding.' And such prima facie case is not overcome by a showing on the part of the bailee that the goods have been burned, or otherwise destroyed or stolen. Before such prima facie case can be said to be overcome, the bailee must further produce evidence tending to prove that the loss, damage or theft was occasioned without his fault. This rule has been applied to garage keepers who failed to return automobiles on demand."

Plaintiff has also proven the common law action of deceit pleaded in its second paragraph of complaint. The Restatement of the Law, "Torts" says:

"§ 525. *Liability for Fraudulent Misrepresentations.*

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation."

"§ 538. *Materiality of Fact Misrepresented.*

(1) Reliance upon a fraudulent misrepresentation of fact in a business transaction is justifiable if, but only if, the fact misrepresented is material.

(2) A fact is material if

(a) its existence or nonexistence is a matter to which a reasonable man would attach importance in determining his choice of action in the transaction in question, or

(b) the maker of the representation knows that its recipient is likely to regard the fact as important although a reasonable man would not so regard it.

(3) The recipient in a business transaction of a fraudulent misrepresentation of a material fact is justified in relying upon it whether or not he believes the maker to have an antagonistic interest in the transaction."

The defendant hotel in the course of a business transaction with the plaintiff caused it harm by falsely representing that it had a safe in which it would place its goods for the purpose of inducing its patronage. Plaintiff's agent relied upon the representation which was material because he would not have stayed at the hotel had he known the truth. The penalty imposed by his employer for staying at such a hotel was the loss of his job. The damages are the value of the plaintiff's property, the possession of which the defendant procured by its fraudulent misrepresentation.

B.

The Innkeeper's Act does not control this case because:

1. As construed below, it violates Sections 12, 20 and 23 of the Bill of Rights of the Indiana Constitution and the 14th Amendment to the Federal Constitution.

2. The causes of action pleaded in the complaint are not within the title.

3. Properly construed, it does not apply to the facts found and proven.

I.

The Court below construed Sec. 3 of the Innkeeper's Act as relieving the innkeeper from his common law liability to his guests not only by abolishing a bailor's cause of action against a bailee for hire (but only when the bailee is an innkeeper), but also by abolishing a paying guest's cause of action for injury to his property due to the willful tort

of the innkeeper. Such a construction violates fundamental rights.

Section 12 of the Bill of Rights of the Constitution of Indiana provides as follows:

> "SEC. 12. *Courts Open—Due Course of Law—Administration of Justice.*—All courts shall be open, and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law, Justice shall be administered freely, and without purchase; completely, and without denial, speedily, and without delay."

There are not too many cases interpreting Section 12. It is generally read in conjunction with Section 20 which provides as follows:

> "SEC. 20. *Trial by Jury Inviolate in Civil Cases.*—In all civil cases, the right of trial by jury shall remain inviolate."

The Supreme Court of Indiana has held that a husband's action for alienation of his wife's affections may be abolished because his right to his wife's affections is not a "property right" within the Indiana constitution. *Pennington* v. *Stewart, et al.*, 212 Ind. 553, 10 N. E. 2d 619. The case indicates that the Legislature is without power to deprive a person of an action for loss of property such as is involved in this case.

In *Warren* v. *Ind. Tel. Co.*, 217 Ind. 93, 26 N. E. 2d 399, the Court sustains the constitutionality of the Indiana Workmen's Compensation Act on the basis that the employee can contract with his employer to substitute the remedy provided in that Act for his common law cause of action based on the negligence of the employer. The Court uses language which indicates that common law actions such as are involved in this case may not be abolished. We quote from pages 101-102:

"These provisions of the Constitution are a part of the

fundamental law of the state, declared by the people themselves acting in their sovereign capacity. *Ellingham* v. *Dye* (1913), 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C 200. As such they are entitled to strict construction. *Lafayette, Muncie and Bloomington R. R. Co. and Another* v. *Geiger* (1870), 34 Ind. 185. It has been said that the language of each provision of the Constitution is to be considered as though every word had been hammered into place. *State ex rel. Hovey* v. *Noble* (1888), 118 Ind. 350, 353, 21 N. E. 244.

"Under the Constitution the right to a jury trial must remain inviolate in civil cases. This guaranty is self-executing and will be enforced independent of statutory enactment. *Schembri* v. *Shearer* (1935), 208 Ind. 97, 194 N. E. 615. But the civil cases referred to have reference only to those actions which were triable by jury at common law. *W. T. Rawleigh Co.* v. *Snider* (1935), 207 Ind. 686, 194 N. E. 356. Actions for injuries to the person caused by the negligence of another were known under the common law of England, and triable by jury. It follows, therefore, that the right to a jury trial in common-law actions for injuries to the person due to negligence is fully protected by Article 1, § 20, of our Constitution."

We respectfully submit that the Innkeeper's Act as interpreted and applied by the Trial Court violates these provisions of the Indiana Constitution. The plaintiff made out a common law action against a bailee for hire and a common law action of deceit. In reliance upon this statute the Trial Court sent the plaintiff forth from the Court of Justice empty handed. We respectfuly submit that this application of the statute renders it unconstitutional because it has deprived the plaintiff of any remedy by due course of law for injury done to it in its property.

This result cannot be sustained on the basis of a substitution of another remedy by contract as was done in sustaining the constitutionality of the Workmen's Compensation Act. No alternative remedy is provided. The plain-

tiff was sent forth empty handed. Neither can it be sustained on the basis of a voluntary contract because the plaintiff never contracted away its cause of action for deceit. The defendant hotel procured the patronage of the plaintiff's employee by a fraudulent misrepresentation and that fraud vitiates the entire transaction. *Guy* v. *Schuldt*, 138 N. E. 2d 891.

The decision below amounts to giving innkeepers a license to steal because if they can defraud their guests with impunity, they can steal from them. In effect it creates a class of persons who are above the law because they are not legally responsible for their misconduct. Courts in other states have stricken down statutes which would destroy recognized remedies for injury to property.

In Illinois the right of action of a husband for alienating the affections of his wife is treated as a property right arising out of contract, and actions for damages for interfering with that right may not be abolished. Sec. 19 of the Illinois Constitution is quite similar to Sec. 12 of the Indiana Constitution. In denying the power to give anyone a license to do wrong on the basis of some supposed public policy, the Supreme Court of Illinois says, in *Heck* v. *Schupp*, 394 Ill. 296, 68 N. E. 2d 464, 466:

> "Almost any common-law cause of action may be used, and at times is used, by blackmailers and extortionists. We are of the opinion that this act violates section 19 of Article II of our state constitution and is invalid."

In *Lebohm* v. *City of Galveston*, 154 Tex. 192, 275 S. W. 2d 951, a pedestrian sued the city for injuries due to a defect in the street. The city pleaded a charter provision exempting it from liability for such injuries. The Supreme Court of Texas held the charter provision void. Under a constitutional provision similar to our Sec. 12, the Court says at page 955:

> "Under authority of a constitutional provision

similar to Section 13 of Article I of our Constitution the Supreme Court of Illinois struck down a statute abolishing all causes of action for alienation of affection upon a conclusion that the statute did not subserve the public welfare but was contrary to the public policy of that state. *Heck* v. *Schupp*, 394 Ill. 296, 68 N. E. 2d 464, 167 A. L. R. 232. For approving comment, see 42 Ill. L. Rev. 233.

Cases reaching an opposite result in dealing with the same problem went off largely on the theory that rights growing out of the marital relationship were not 'property right' entitled to protection under a constitutional provision for a remedy for injury to one's 'person, property, or reputation', and that the marital relationship and rights flowing therefrom were peculiarly within the field of permissible legislative regulation. See *Hanfgarn* v. *Mark*, 274 N. Y. 22, 8 N. E. 2d 47; *Pennington* v. *Stewart*, 212 Ind. 553, 10 N. E. 2d 619.

Thus it may be seen that legislative action with-drawing common-law remedies for well established common-law causes of action for injuries to one's 'lands, goods, person or reputation' is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare. Legislative action of this type is not sustained when it is arbitrary or unreasonable."

Section 23 of the Bill of Rights of the Constitution of Indiana provides:

> " 'The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' "

The Supreme Court in *Hanley* v. *State*, 234 Ind. 326, 123 N. E. 2d 452, holds that this section of our Constitution prevented the Legislature from granting to veterans free hunting licenses. The reasoning in this opinion alone

should certainly prevent the Legislature from granting free licenses to inkeepers to defraud and cheat their guests.

The Massachusetts Legislature considered adopting an act to the effect that no court should entertain an action against a trade union or an association of employees in respect of a tortious act alleged to have been committed on behalf of or by such union or association. The judges of the Supreme Court declared that such act would violate both the state Bill of Rights and the 14th *Amendment to the* Constitution of the United States. *In re Opinion of the Justices,* 98 N. E. 337. If we substitute innkeepers for trade unions and place the plaintiff in the position of the injured person, this statute has the same effect as that which the defendant requests the court to apply to the Innkeeper's Act. The following language of the Supreme Court of Massachusetts is significant and applicable:

> "It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations, other than those named, of the protection of safety, liberty and property which any free government must secure to its subjects. It takes from them the unhampered right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for the injuries done. It would prevent all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged few therein designated."

In considering the constitutionality of the Innkeeper's Act insofar as it gives the innkeeper a license to defraud his guests by abolishing liability for the cause of action proven under the second paragraph of complaint, we call

attention to the decisions interpreting the statutes which attempt to limit or abolish the liability of newspapers for libel. These statutes have traveled a rocky road. Most of the statutes give an alternative remedy to the common law remedy and go little farther than abolish punitive damages in the absence of malice after a retraction has been published.

As far as we know, the constitutionality of the Indiana *Statute*, Acts 1895, Ch. 45, has not been passed on. Our Supreme Court refused to pass on it under the familiar rule that a court "will not decide a constitutional question when it can, as in this case, properly rest its decision upon other grounds." *White* v. *Sun Pub. Co.*, 164 Ind. 426, 430, 73 N. E. 890.

The origiral statute in Michigan was declared unconstitutional as permitting private reputation to be destroyed without adequate remedy. *Park* v. *Detroit Free Press*, 1888, 72 Mich. 560, 40 N. W. 731. The next year the same statute was held constitutional in Minnesota. In *Allen* v. *Pioneer-Press*, 1889, 40 Minn. 117, 41 N. W. 936, the court held that the classification of newspapers separately in libel matters is not unreasonable because of the nature of the business and that a limitation of recovery to actual damages after retraction was an adequate remedy. The Court did not hold that the entire remedy could be abolished as the Indiana Innkeeper's Act seeks to do.

In *Byers* v. *Meridian Printing Co.*, 84 Ohio St. 408, 95 N. E. 917, the Court had before it a constitutional provision which granted every person a remedy "for an injury done him in his land, goods, person or reputation." The Trial Court sustained a statutory provision that a demand for a retraction followed by a retraction abolished the presumption of malice. In reversing the Supreme Court stated:

"By settled principles of the common law, the publica-

> tion of defamatory matter, which is false in fact and not privileged, is presumed to be malicious—that is, the plaintiff may recover without proving malice—and the burden is upon the defendant to disprove it. This is the substantive law, and not mere matter of procedure. By the common law, also, one who is injured by such a publication may, by natural right, demand an apology or retraction, but unless it were accepted as a satisfaction it would not be a complete defense, and would only be considered in mitigation of damages. This, again, is substantive law and not a matter of formal procedure. These rules have always been regarded as primary and essential in the law of libel for protection of reputation not only for injury which may be measured by money values, but for that 'intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction.' And therefore they are to be regarded as part of the 'remedy by due course of law' of which the Constitution declares that no person shall be deprived. These rights the Legislature did not give to the libeled person and the Legislature cannot take them away."

A later decision states that after injury, plaintiff was entitled to his constitutional remedy at law and to demand a retraction. The "Legislature had no right to put him on his election as to two courses, both of which he was entitled to follow." *State* v. *Creamer*, 85 Oh. St. 349, 97 N. E. 602, 607.

In determining whether or not a statute limiting the liability of innkeepers for the torts committed by them is unconstitutional as granting special privileges and immunities, we think it is necessary to consider the purpose intended by the statute and the facts involved in this case. At the common law the liability of an innkeeper was practically that of an insurer. It might be proper to adopt a special statute to remedy any unfairness in imposing such liability in cases involving the property of guests in their

own possession or in their rooms. But that reasoning would not apply to the facts at bar or either paragraph of complaint. There is no constitutional justification for classifying the liability of an innkeeper, as a bailee for hire, any differently from the liability of a parking lot or a restaurant. There is also no constitutional foundation whatever for giving innkeepers a license to steal or fraud.

We submit that any special legislation which grants or is construed to grant special immunity to innkeepers for their liability as bailees for hire or for their own torts is void as class legislation.

There can be no sound public policy to sustain legislation abolishing all actions against innkeepers. After all they have various methods of protecting themselves against claims from their paying guests. They can and should charge rates sufficient to cover the hazard or they can and should carry adequate liability insurance. While it may seem harsh to impose a substantial liability upon an innkeeper for the use of a $10.00 room, we hasten to point out to the Court that it is no harsher than to impose upon a street car company a liability of thousands of dollars for a 10¢ fare. We think the legislature can no more abolish the liability of an innkeeper to his paying guests than it can the liability of a street car company to its passengers.

2.

The title of the Act states that it is an act regarding the liability of hotels, etc., for loss or damage of the property of guests. Sections of theAct not within the title are void under Article 4, Sec. 19 of the Constitution of Indiana. While the title of an act is liberally construed to ascertain its meaning, it may not be extended to cover matters not therein referred to. For example, the title of an act regarding the practice of optometry may not be extended to

prevent advertising and sale of eye glasses as items of merchandise. *State ex rel. Booth* v. *Beck Jewelry Enterprises*, 220 Ind. 276 at 286, 41 N. E. 2d 622. Strictly speaking, the defendant cannot claim to be protected by the Act because it refers only to the property of guests. The plaintiff was not a guest. In order to bring this case within the terms of the Act, the title must be stretched to cover property of persons not guests. We believe this is an undue extension of the title and, therefore, the Act does not protect the defendant.

In *Heck* v. *Schupp*, 394 Ill. 296, 68 N. E. 2d 464, the Supreme Court held that the title of "an act in relation to certain causes of action conductive to extortion, etc." does not give any hint that its purpose is to abolish any civil causes of action. Certainly that title was as broad as the one involved in this case. We feel that an act regarding the liability of hotels does not cover the subject of a statute which abolishes any cause of action for loss of or damage to merchandise brought into hotels.

3.

The Innkeeper's Act does not apply to our facts. Once the plaintiff has established the deposit of the property with the defendant, the defendant has the burden of establishing an affirmative defense. It has failed on two grounds.

First, the defendant hotel did not post the statutory notice in a public and conspicuous place and manner at the place of registration or in each guest room. This failure is fatal. The authorities are uniform that statutory requirements as to notice must be precisely complied with, both as to form and posting. Knowledge of the existence of the Act is immaterial. 28 Am. Jur., 595, Innkeepers, Sec. 79. "The statute is in contravention of the common law, and hence to be construed strictly." *Ransom* v. *Williams*, 2 Wall. 313, 17 L. ed. 803.

Second, Section 1 does not protect the defendant because it did not have a satisfactory safe. Elementary principles of justice and fair dealing prevent it from claiming that it had a satisfactory safe after it accepted property which would not fit in its only safe. Section 2 does not apply because it refers to merchandise other than that covered by Sections 1 and 3. Section 3 does not apply because it refers only to merchandise which remains in the custody of the guest and not to merchandise deposited with the innkeeper under Section 1.

The Court is familiar with the practice of drummers or salesmen setting up showrooms in hotels, especially during conventions. It was to protect the innkeeper against excessive liability in such a situation that Section 3 was adopted. The statute is to be strictly construed, 28 Am. Jur. 591, so there is no point in construing it to cover merchandise bailed to the innkeeper. Our construction is highly desirable because it avoids a grave constitutional question.

In considering the meaning of Section 3, we call attention to Section 2 which states, "Except as provided in the foregoing section the hotel * * * shall not be liable for the loss of * * * personal property, other than merchandise samples * * * brought into such hotel * * * by any guest thereof, exceeding $200.00 in value * * *." This language indicates a legislative intent to treat property deposited for safekeeping in a safe differently from all other property brought in by a guest.

The words "Except as provided in the foregoing section" indicate that the property referred to in the foregoing section is excluded from what comes later in the Act.

II.

The Act is never available to protect an innkeeper from a personal tort perpetrated against his guest. While the Act might protect an innkeeper from the consequences of a theft by his minor employees, it will not protect him from his own theft. The statute limits the liability of the bailee at common law but has no effect upon the torts of the bailee. 32 C. J. 552, 28 Am. Jur. 591, Sec. 74.

The defendant hotel is liable for the tort committed by it in obtaining possession of the plaintiff's property by fraud, if not for failure to perform its duties as a bailee for hire. The actual damages are the loss of the property to which exemplary damages of an equal amount could well be added. We quote from *Goodwin* v. *Georgian Hotel Co.*, 197 Wash. 173, 84 P. 2d 681, 687:

> "However, for obvious reasons, we also construe our statute to mean that the limitation of liability does not apply in case of a theft by the hotelkeeper himself or in case of appropriation by the hotelkeeper, whether individual or corporate. To hold otherwise, would be manifestly absurd and palpably wrong. Theft by an employee is theft from the bailee, and is committed by one acting outside of the scope of his employment, while theft by the hotelkeeper is a theft from the bailor by the bailee himself. *Millhiser* v. *Beau Site Co.*, 251 N. Y. 290, 167 N. E. 447. Appropriation by the hotelkeeper is subject to equal condemnation. *In re Brainard Hotel Co.*, 2 Cir., 75 F. 2d 481."

III.

The defendant has failed to prove that the contract between the parties established by the Safety Deposit Envelopes was not a special agreement in writing agreeing to assume liability for the full value of the property. The use of such envelopes was direct written notice of the de-

posit of valuable property. The defendant waived the requirement that its specific value be stated and had an established rule that its employees were authorized to accept property of a value in excess of the limits fixed in the Act. The agreement to surrender the deposited property only to the person whose signature appeared on the check was unlimited in amount and an acceptance of a liability greater than that imposed by the Act. The damages for the breach of this agreement are the value of the property which has not been returned.

The Opinion shows that the Trial Court reached a contrary result by erroneously imposing on plaintiff the burden of avoiding the effect of the statute. This is clear error, for the authorities are uniform that the innkeeper must bring himself within the statute. 28 Am. Jur. 594, Innkeepers, Sec. 78, Compliance with Requirements.

This erroneous approach was particularly harmful when the Court thought "that Danziger was remiss in not complying with the statute" (A. 93), instead of giving the natural effect to the conduct of the hotel in waiving a declaration of value. The general rule is that it is not "negligence for a guest to fail to volunteer information as to the character of the property or to fail to declare its value in depositing it for safekeeping." 28 Am. Jur. 597. In Indiana it is well settled that "the failure of the guest to inform the innkeeper or his servant that his valise contained valuables does not constitute negligence." *Bowell* v. *DeWald*, 2 Ind. App. 303, 309-10. This case is peculiarly in point because plaintiffs were permitted to recover the value of money in a satchel deposited by their employee with the defendant hotel.

In *Sagman* v. *Richmond Hotels*, 138 F. Supp. 407, the court says:

> "It is my view that the duty is upon the inn-keeper to make inquiry concerning the value. He may at his

option decline to accept responsibility under the statute or he may require as a condition permission to examine it and satisfy himself as to value. In the case of money, he probably would desire to have it counted before accepting liability. Should he fail to make such inquiry, he does so at his own risk and is liable for resulting loss, depending upon proper proof."

We believe that we should point out at this time that the contributory negligence, if any, of Danziger is not a defense to plaintiff's cause of action for deceit. *Hosei* v. *Cain*, 222 Ind. 330, 342, 53 N. E. 2d 165.

We suppose that an innkeeper, like a telegraph company, might limit his liability by adopting certain rules and regulations. It has long been the law in Indiana, however, that this does not include gross negligence and *a fortiori* wrongful conduct. The rule is thus stated in the *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429 at 441.

"While these authorities establish the proposition that telegraph companies may, within certain limits, establish rules and regulations which, in cases not depending on any statute, may govern the manner of sending messages, and the prices to be paid for messages, repeated messages, and insured messages, they also establish the proposition that such companies cannot make such rules and regulations as will protect them from liability for damages resulting from their own gross negligence, or the gross negligence of their agents and servants.

In the case under consideration, we cannot regard the acts of the agent of the company as anything but the result of gross negligence, or incompetency. That the agent of a company should not know of the existence of a town which is the county seat of a neighboring county, the town being one of the stations on the line of the company, shows his utter unfitness for the position. The agent himself testifies, 'I sent it' (the dispatch) 'to West Lebanon, Warren County. I did

not know of the other place at the time.' We think the company was guilty of gross negligence in employing such an operator."

If the agent of the telegraph company imposes liability on his employer because he does not know of the existence of a town, certainly the agent of a hotel imposes liability on his employer for concealing the non-existence of a safe.

In *Keenan Hotel Co.* v. *Funk* (T. D., 1932), 93 Ind. App. 677, the Court directly holds at page 680 that a bailee for hire, such as the defendant, cannot relieve itself from liability for negligence by any printed statement on a claim check.

The plaintiff has, therefore, not waived its rights in this case by reason of any statement on the checks delivered to Danziger.

IV.

The Trial Court failed to make any finding on the second paragraph of complaint and probably failed to find certain material facts, although this was called to his attention by a motion for a new trial. This is not a finding against the plaintiff. This Court will make the appropriate findings, if possible, and if not, remand the case for reconsideration.

The rule is thus stated in *Kweskin* v. *Finkelstein,* 7th Cir., 223 F. 2d 677 at 679:

> "We are reluctant to remand this or any other case in order to have the proper findings entered. We realize that such a remand will involve a delay and additional expense for each of the parties. Under Title 28 U. S. C. A. § 2106 we have the authority to affirm, modify or reverse the judgment, and we might consider the failure to make adequate findings of fact as non-reversible error if we can ascertain from the record that one party or the other is clearly entitled to judgment in his favor."

Since there is no dispute about the material facts, this Court should enter the appropriate judgment in favor of the plaintiff and not put the parties to the unnecessary expense which would be occasioned by a remand.

Conclusion.

Under the facts found and proven, the defendant induced plaintiff's patronage by representing that it had a safe to protect plaintiff's property. It accepted a bailment of property, found to be worth $29,646.50, made on the strength of that representation. The common law liability of the defendant is clear. It is established even by the registration card and Safety Deposit Envelopes it used.

This is not an attempt to hold an innkeeper liable for the default of some employee. It is an action to hold the innkeeper liable for its own breach of a contract of bailment or its own tort. We claim no moral turpitude for that is not necessary. But, we do claim, and have proven, a legal misrepresentation for profit—a deliberate intention to get business by accepting property of guests for safekeeping in a non-existent safe.

We submit that the Legislature cannot deprive plaintiff of a remedy for this injury to its property under familiar and fundamental constitutional principles, that the Innkeeper's Act cannot and does not deprive plaintiff of an adequate remedy and that such Act should be construed so as not to affect the liability of the defendant innkeeper for its own torts. Judgment should, therefore, be entered in plaintiff's favor for $29,646.50.

In closing may we respectfully remind this Court that this is an Indiana case governed by Indiana law. In our state "fraud vitiates anything. Courts will not uphold fraud or presume the Legislature intended to do so • • •.

The language of the statute should be so plain that there is no question of its meaning if the Legislature intends to give a wrongdoer the advantage and benefit of his fraudulent concealment." *Guy* v. *Schuldt,* 138 N. E. 2d 891, 896. Under this rule of statutory construction, as reaffirmed in this most recent decision of our Supreme Court, the Act relied on does not protect the defendant.

If this Court construes the Innkeeper's Act as we do, it avoids deciding the question of its constitutionality.

It is, therefore, a proper case to apply the well-settled Indiana doctrine that a court "will not decide a constitutional question when it can, as in this case, properly rest its decision upon other grounds." *White* v. *Sun Pub. Co.,* 164 Ind. 426, 430, 73 N. E. 890.

Respectfully submitted,

BARRETT, BARRETT & MCNAGNY,
By J. A. BRUGGEMAN,
Attorneys for Plaintiff.

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5 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Indiana,

Fort Wayne Division.

Eichberg & Company, Inc.
vs.
Van Orman Fort Wayne Corporation
} Civil No. 862

COMPLAINT FOR DAMAGES.

(Filed Jul. 27, 1955. Kenneth Lackey, Clerk.)

Plaintiff complains of the Defendant, and says that:

1. Plaintiff is a corporation organized and existing under the laws of the State of New York, and a citizen and resident of that state. Defendant is a corporation organized and existing under the laws of the State of Indiana, and is a citizen and resident of that state.

2. The amount involved in this controversy, exclusive of interest and costs, is more than $3,000.00.

3. Plaintiff is engaged, among other things, in the conduct of a jewelry store in New York City, and in the sale of jewelry and valuable gems, through its agents, in various parts of the United States.

Defendant now is and was at all times hereinbefore mentioned, engaged in the management and operation of a hotel in the City of Fort Wayne, Indiana, known as the Hotel Van Orman.

4. On or about the 25th day of October, 1954, the Plaintiff, through its agent and representative, who was then and there a paying guest at Defendant's said hotel, delivered to Defendant two traveling cases containing jewelry and
6 precious stones, of the value of $22,626.21, and instructed Defendant to place such traveling cases in a vault for safekeeping; and Defendant received and ac-

cepted such traveling cases and their contents for safekeeping in the manner directed by Plaintiff's said agent, and issued to Plaintiff two depositor's checks, Nos. 1809 and 1811 respectively, copies of which depositor's checks are attached hereto and filed herewith, marked Exhibits 1 and 2 respectively, and by this reference incorporated in and made a part of this complaint.

5. On the following day, Plaintiff, through its said agent and representative, presented both of said depositor's checks, marked Exhibits 1 and 2, to Defendant, and requested the return of the property above described, which Plaintiff's said agent and representative had theretofore deposited with Defendant for safekeeping.

6. Defendant, upon the presentation of said deposit checks, failed and refused to return such property.

Wherefore, Plaintiff demands judgment against Defendant in the sum of $25,000.00, and all such other and further relief as may be proper in the premises.

Barrett, Barrett and McNagny
Attorneys for Plaintiff,
344 Utility Building,
Fort Wayne, Indiana.
By Phil M. McNagny.

7 Exhibit 1.

1809 Depositor's Check.

This check to be signed only when package is called for and in the presence of the clerk on duty.

Signature of Depositor E. J. Danziger

Delivered by ..... Date ..... 19.....

Package will be delivered only to party originally depositing it, whose signature appears on duplicate check on package.

8 **Exhibit 2.**

1811 Depositor's check.

This check to be signed only when package is called for and in the presence of the clerk on duty.
Signature of Depositor E. J. Danziger
Delivered by _____ Date _____ 19____
Package will be delivered only to party originally depositing it, whose signature appears on duplicate check on package.

25 IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—862) • •

ANSWER TO COMPLAINT FOR DAMAGES.

(Filed Mar. 21, 1956. Kenneth Lackey, Clerk.)

For answer to the complaint of the Plaintiff in the above entitled cause, Van Orman Fort Wayne Corporation, Defendant above named, says that:

1. Defendant admits the allegations contained in paragraph one (1) of the complaint.
2. Defendant denies each and every allegation contained in paragraph two (2) of the complaint.
3. Defendant admits the allegations contained in paragraph three (3) of the complaint.
4. Defendant denies each and every allegation contained in paragraph four (4) of the complaint.
5. Defendant denies each and every allegation contained in paragraph five (5) of the complaint.
6. Defendant denies each and every allegation contained in paragraph six (6) of the complaint.
7. Defendant denies each and every allegation in the complaint, not herein admitted, controverted or specifically denied.

Defenses.

8. For a first, separate and distinct defense, Defendant alleges that it now does and did at all times hereinbefore mentioned in said complaint provide a safe in a convenient place for the safekeeping of money, jewels, ornaments, furs, bank notes, bonds, negotiable securities or other valuable papers, precious stones, railroad tickets, articles of silver or gold or other valuable property of small compass belonging to or brought in by the guests of said Defendant, and Defendant did at all times hereinbefore mentioned in said complaint notify its guests by posting a notice in a public and conspicuous place and manner at the place of registration of the hotel of said Defendant, stating the fact that such place was provided in which such articles might be deposited. The Plaintiff's agent neglected and failed to deliver the said property mentioned in Plaintiff's complaint to the person in charge of such office for deposit in such safe at the time on or about the 25th day of October, 1954, when the Plaintiff's agent registered in the said hotel of the Defendant.

9. For a second, separate and distinct defense, Defendant alleges that the property mentioned in the Plaintiff's complaint, and described as two traveling cases containing jewelry and precious stones, were merchandise samples or merchandise for sale; that the Plaintiff gave no prior written notice of having brought such merchandise into the hotel of the Defendant and of the value thereof.

10. For a third, separate and distinct defense, Defendant alleges that the property mentioned in Plaintiff's complaint, and described as two traveling cases containing jewelry and precious stones, was personal property other than merchandise samples and merchandise for sale and that said Defendant did not contract in writing to assume any liability in connection with said property.

11. For a fourth, separate and distinct defense, Defendant alleges that at all times hereinbefore mentioned in said complaint the Defendant was not in any respects negligent, and that any loss of or damage to any of such property as described in Plaintiff's complaint was occasioned by the negligence of Plaintiff's agent.

27 12. For a fifth, separate and distinct defense, Defendant alleges that this Court has no jurisdiction over the subject matter of this action for the reason that the value of the matter in controversy herein, exclusive of interest and costs, does not exceed the sum of Three Thousand Dollars ($3,000.00), and alleges that this cause of action is controlled by Burns Indiana Statutes, Volume 7 (Part 2), Sections 37-105, 37-106 and 37-107, which said statutes provide for a limitation of the liability of hotels for loss or damage of the property of guests in situations the same as presented by this cause of action. The limitation of the liability of the Defendant by said statutes in the loss or damage of the property of the Plaintiff, as described in said complaint, cannot exceed respectively the sum of $600.00, the sum of $200.00, or the sum of $400.00, depending upon the character of the said property of the Plaintiff, whether such loss or damage is occasioned by the negligence of the Defendant or otherwise, notwithstanding said property may be of greater value. Therefore, since by the above statutes, which control this cause of action, the Defendant's liability cannot exceed the above sums in any event regardless of whether or not the loss or damage is caused by Defendant's negligence, the amount involved in this controversy, exclusive of interest and costs, cannot exceed $3,000.00 despite allegations to the contrary in its complaint by the Plaintiff.

WHEREFORE, the Defendant prays judgment that the complaint of the Plaintiff be dismissed with costs to the

Defendant, and all such other and further relief as may be proper in the premises.

JEROME B. VAN ORMAN,
Attorney for Defendant,
607 Fort Wayne Bank Bldg.,
Fort Wayne, Indiana,
Telephone: Eastbrook 8201.

28 I certify that I served the within Answer to Complaint on the Plaintiff in the above entitled cause by mailing, postage prepaid, to its attorneys of record, Barrett, Barrett & McNagny, at their office address, 344 Utility Building, Fort Wayne, Indiana, a true copy of said Answer to Complaint this 21st day of March, 1956.

Jerome B. Van Orman.

29 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—862) * *

SECOND PARAGRAPH OF COMPLAINT.

(Filed Mar. 27, 1956. Kenneth Lackey, Clerk.)

For its second paragraph of complaint the plaintiff says that:

1. Plaintiff is a corporation organized and existing under the laws of the State of New York, and a citizen and resident of that state. Defendant is a corporation organized and existing under the laws of the State of Indiana, and is a citizen and resident of that state.

2. The amount involved in this controversy, exclusive of interest and costs, is more than $3,000.00.

3. Plaintiff is engaged, among other things, in the sale of jewelry and valuable gems, through its agents, in various parts of the United States.

4. Defendant operates a hotel in the City of Fort Wayne, Indiana known as the Van Orman.

5. On or about the 25th day of October, 1954, one of plaintiff's agents and representatives, Edmund J. Danziger, checked into the Van Orman Hotel and after having registered as a guest, delivered to the defendant two traveling cases containing jewelry and precious stones and articles of the reasonable value of about $25,000.00, and instructed the defendant to place such traveling cases in the vault for safekeeping; the defendant had Mr. Danziger sign two "safety deposit envelopes" and attached one of such envelopes to each of said traveling cases and delivered to him the depositor's checks as evidence of such deposit, copies of which are filed herewith, marked Exhibits 1 and 2, and by this reference made a part hereof.

29½ 6. At the time that Mr. Danziger deposited said traveling cases with the defendant and instructed it to place them in a vault for safekeeping, the defendant represented to him that it had a vault for such safekeeping and was going to place said cases therein, and plaintiff by and through its said representative relied upon and believed said representations, and in reliance thereupon deposited such cases with the defendant in the manner hereinabove described.

7. Said representations were false and fraudulent, and known to the defendant to be false and fraudulent, in that the defendant had no vault for safekeeping of said traveling cases and it did not intend to place such traveling cases in a vault at the time of making such representations, and it accepted the custody and undertook the safekeeping of said traveling cases with the knowledge that the plaintiff was relying upon the truth of its representations that it had a vault and would place such cases in said vault.

8. Mr. Danziger would not have stayed at the Van Orman Hotel had he been advised there was no vault available for the safekeeping of said traveling cases.

9. Instead of placing such cases in a vault, the defend-

ant placed them in an assistant manager's office, to which many people had access and which was not locked or otherwise safeguarded. As a proximate result thereof, said cases disappeared and the defendant was unable to deliver them to the plaintiff the following morning upon demand, all to the plaintiff's damage in the sum of $25,000.00.

10. Defendant's said fraudulent representations were wilfully made and, therefore, plaintiff is entitled to punitive damages in the sum of $25,000.00.

Wherefore, plaintiff sues and demands judgment in
30 the sum of $50,000.00 and for all other just and proper relief in the premises.

Barrett, Barrett & McNagny,
J. A. Bruggeman,
Attorneys for Plaintiff.

31 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—862) * *

ANSWER TO SECOND PARAGRAPH OF COMPLAINT.

(Filed Apr. 25, 1956. Kenneth Lackey, Clerk.)

For answer to the Second Paragraph of Complaint of the Plaintiff in the above entitled cause, Van Orman Fort Wayne Corporation, the defendant above named, says that:

1. Defendant admits the allegations contained in paragraph one (1) of the Second Paragraph of complaint.

2. Defendant denies each and every allegation contained in paragraph two (2) of the Second Paragraph of complaint.

3. Defendant admits the allegations contained in paragraph three (3) of the Second Paragraph of complaint.

4. Defendant admits the allegations contained in paragraph four (4) of the Second Paragraph of complaint.

5. Defendant denies each and every allegation contained in paragraph five (5) of the Second Paragraph of complaint.

6. Defendant denies each and every allegation contained in paragraph six (6) of the Second Paragraph of complaint.

7. Defendant denies each and every allegation contained in paragraph seven (7) of the Second Paragraph of complaint.

8. Defendant denies each and every allegation contained in paragraph eight (8) of the Second Paragraph of complaint.

9. Defendant denies each and every allegation contained in paragraph nine (9) of the Second Paragraph of complaint.

32 10. Defendant denies each and every allegation contained in paragraph ten (10) of the Second Paragraph of complaint.

11. Defendant denies each and every allegation in the Second Paragraph of complaint not herein admitted, controverted or specifically denied.

Wherefore, the defendant prays judgment that the Second Paragraph of Complaint of the Plaintiff be dismissed with costs to the Defendant and all such other and further relief as may be proper in the premises.

Jerome B. Van Orman,
Attorney for Defendant,
607 Fort Wayne Bank Building,
Fort Wayne, Indiana,
Telephone: Eastbrook 8201.

I certify that I served the within Answer to Second Paragraph of Complaint on the plaintiff in the above entitled cause by mailing, postage prepaid, to its attorneys of record, Barrett, Barrett & McNagny, at their office address, 344 Utility Building, Fort Wayne, Indiana, a true

copy of said Answer to Second Paragraph of Complaint this 25th day of April, 1956.

Jerome B. Van Orman.

33 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—862) * *

Depositions taken by the plaintiff under the rules of Civil Procedure of the District Courts of the United States, for discovery purposes, on the 22nd and 25th days of November, 1955, in Room 344, Utility Building, Fort Wayne, Indiana, before William R. Garvin, Reporter of the Allen Superior Court No. 2, Allen County, Indiana. The defendant waived notice of the time and place of taking these depositions.

84 CHARLES BLOODGOOD, after being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

Direct Examination by Mr. J. A. Bruggeman.

Q. Will you tell us your name, please?
A. Charles Bloodgood.
Q. And where do you live?
A. 813 Canal.
Q. How long have you lived there, Mr. Bloodgood?
A. Since the 1st of July.
Q. And before that where did you live?
A. Over on West Main, I think it was.
Q. And with whom do you live at that address?
A. My wife and girl.
Q. How old are you?
A. Twenty-seven.
Q. How long have you worked for the Van Orman Hotel Company?

A. Since March of '54.

Q. Before that where did you work?

A. At the Indiana Hotel.

Q. And how long did you work at the Indiana?

A. Oh, about three months.

85 Q. And before that where did you work?

A. Down in Kentucky.

Q. Where in Kentucky?

A. Paducah.

Q. In what sort of work?

A. I was radio dispatcher for a cab company.

Q. Had you ever worked for any hotel before you went to work for the Indiana Hotel?

A. Roosevelt Hotel down in New Orleans.

Q. During the period of time that you have worked for the Van Orman Hotel Company what has your job been?

A. Bellhop and grillman in the Java Shop.

Q. You have had those two jobs all the time?

A. Yes.

Q. Now on October 25, 1954, I believe that's the day that Mr. Danziger checked in, what were your hours on duty that day?

A. Well, 12:00 to 7:00 we were working a split shift at that time.

Q. By that you mean 12:00 noon until 7:00 in the evening?

A. Correct.

Q. Had you ever seen Mr. Danziger before that?

A. No, sir.

Q. When did you meet him that evening—where and when, just what you recall about meeting him?

A. Well, he came in the hotel to check in and went

86 up to the desk and registered, asked to check his baggage, his baggage that he had there, I got the checks

from Miss Ruby and took him over to the desk, that's the desk—it is not the desk that the register is, the desk over in the cubby hole over in front of the manager's office.

Q. Well, now was it to the east or west of where the register is?

A. Gee—

Q. Well, the desk, your register faces south, faces toward Berry Street, we are all agreed on that.

A. Correct. Well, it would be to the left facing the desk, that would be west.

Q. Did you help him carry these cases into the hotel?

A. No, sir, he wouldn't allow anybody to help him.

Q. Did you see him come into the hotel?

A. Yes, I was standing in front.

Q. Which door were you at, Berry or Harrison?

A. He came in the Harrison Street entrance.

Q. Did anybody come in with him?

A. The doorman came in with him.

Q. Did the doorman carry anything?

A. The doorman carried his personal bag in, he wouldn't let the doorman handle his sample cases, whatever they were.

Q. How many of these cases did he have?

87 A. As I remember correctly, he had a personal bag, a brief case and these two sample cases.

Q. Did you go over to him as soon as he came in the door?

A. I approached him as I do anybody that carries in that door, that is carrying the bags by themselves, and tried to get his baggage from him, and he said he would rather carry it by himself.

Q. And the doorman was behind him there?

A. With his personal bag.

Q. What did you do after you asked him for the cases?

A. I returned to the front post.

Q. You didn't take the personal baggage from the doorman?

A. No, the doorman takes the personal baggage and puts them right behind those couches where all the incoming baggage is lined up at.

Q. That's taken in by the doorman and not by the bellman?

A. Well, the doorman usually meets the guest at the car and inquires as to what baggage is to come in, and then he brings it in all the way, and then he asks the guest if they would like to have the car checked, and so forth and so on.

Q. Who was the doorman that night?

A. Moon Mullins.

Q. Is he still there?

A. No, sir, he is dead.

Mr. Van Orman: He died about a month ago.

88 Q. And then how did you happen to go over to the desk?

A. Well, see, I was on front post; in other words, it was my time to go take the next guest to the room, and the room clerk called me over in front.

Q. And who was the room clerk?

A. I don't remember exactly, I think Mary Lou was on duty, I am not sure.

Q. It was some girl?

A. Yes, sir.

Q. All right, the room clerk called you over there and then what happened?

A. And she informed me that he would like to check these two bags for safe deposit and also room him, take him up to his room.

Q. Were these cases on top of the counter then?

A. No, sir, he had one on each side of him, he just set them both down as he started to register.

Q. All right, then what happened?

A. Well, I went over and I picked up his key and his rooming slip, asked Miss Ruby for these checks, took him over to this desk, and had him sign the two checks and give them to him.

Q. Now where is this desk that you speak of?

A. That's the one that is in front of Mr. Ryan's office, a little cubby hole there.

89 Mr. Van Orman: Is that desk in front of the manager's office but toward the left so it doesn't block the ingress and egress to the manager's office?

A. That's right.

Q. That desk is still there?

A. Yes.

Q. Has there been any change in the layout there at the hotel since the time that happened and the present time?

A. Not that I know of, no.

Q. Now the slips you speak of, they are the type here that I am showing you, Exhibit A?

A. Yes, sir.

Q. And you had him sign here.

A. (indicating).

Q. On this line under the "A" check?

A. Yes, sir, I did.

Q. Did he do anything besides sign that?

A. No, sir, I just asked him to sign this one here on both checks.

Q. He signed both checks?

A. Yes, sir.

Q. Then what did you do with the checks?

A. I took this one here and tore it off.

Q. That's the bottom, part "B"?

90 A. Yes.

Q. And what did you do with the other part?

A. This, (indicating) I took it like this and sealed it so the handle of both bags—I mean one on each bag, it was around the handle of each bag.

Q. So you folded the envelope around the handle, the one envelope around the handle of each bag?

A. Yes, sir.

Q. And then what did you do with the bags?

A. Then I carried the bags into Mr. Ryan's office and set them right underneath the air conditioner there.

Q. Did anybody go with you when you took them into the office?

A. He came into the doorway, he didn't come all the way into the office, he came into the doorway.

Q. You mean by that he walked along behind you?

A. Yes.

Q. And did he see you put them down?

A. Yes, sir.

Q. Who else was there at that time?

A. Mr. Ryan's Secretary and Mr. Horning was making a phone call.

Q. Did anybody connected with the hotel sign these envelopes that were put around the bags?

A. No, sir, nobody signs those envelopes except for the okay on the slip after they retrieve them, the
91 object is for the persons depositing this stuff to sign this check, leave the "B" check unsigned until he calls for it, and then the Cashier or Manager, whoever picks the check up to get the stuff compares the two signatures.

Q. But nobody signed the part there marked "Received by", under A?

A. No, sir.

Q. Did you have any talk with him about the checking in or anything at all at the time he was signing or before?

A. What do you mean?

Q. Well, I mean just what did you say and what did he say to you at the time the checks were signed?

A. Didn't say anything, he just signed them.

Q. You didn't tell him anything about your procedure or where you would keep the articles or anything like that?

A. No, sir, thought that was already explained to him, because the room clerk had told me that he had wanted to check them, that's all I did.

Q. You just told him where to sign?

A. Yes, sir.

Q. Did he sign them in ink or did he sign them in pencil?

A. I don't know.

Q. You don't remember?

A. No, sir, I don't.

Q. And then after he signed them you carried 92 them in and came out?

A. I carried them in there and came back out and asked him if he wanted to go upstairs now, and he said he did, so I took him upstairs and roomed him.

Q. And then you left him?

A. Yes, sir.

Q. Did you see him again until the next morning?

A. Well, I was off the next day, but I came in the hotel for some reason. I can't remember what it was exactly —oh, yes, I came in to see Cecil, and they told me that they were missing, and if I knew anything about them, so I went to talk to the man and he didn't even know that I had been the one that checked them that night, in fact he didn't even recognize me and he then—he asked me if I knew anything about it, and I said no, the last time I seen it was the last time he had seen it, when I placed them on the floor in Mr. Ryan's office.

Q. Did you ask him to put a value on these cases?

A. No, sir, I didn't, that's one thing bellhops don't do.

Q. Did you say anything to him about he should or shouldn't put a value on them?

A. No, sir, I didn't.

Q. And you didn't hear anybody else talk about that?

A. No, sir.

Q. Did you hear any of the conversation between
93 him and the room clerk at the time he signed in?

A. No, sir, I didn't.

Q. Did you ask him what was in those cases?

A. No, sir, I didn't.

Q. And he didn't tell you what was in them?

A. No.

Q. Do you ever have occasions to put things in and out of the safe at the Van Orman?

A. Yes, sir, several times.

Q. What articles do you put in there?

A. Well, exactly what they are, I don't know, just sample cases.

Q. Is there any limitation on the size that you put in there?

A. Well, no, I mean if I can handle it.

Q. Where is that safe?

A. Well, the only place that I have ever put it in is Mr. Ryan's office.

Q. Now when you speak of a safe you mean Mr. Ryan's office?

A. Well, it is not exactly a safe, I don't know what you mean by "a safe", the only place I have ever placed in what we call safety deposit is in Mr. Ryan's office.

Q. That's what you refer to as a safety deposit?

A. Well, that's where it is usually put, I have had occasion to use it only about three or four times since I was there.

94 Q. They do have a steel vault, though, in the hotel some place, don't they?

A. Yes, sir, I believe so.

Q. Have you ever put anything in that vault?

A. No, sir, we haven't access to that at all.

Q. That's just the room clerks and the cashiers?

A. And different managers.

Q. At any time has anybody connected with the Van Orman Hotel given you any instructions as to how to handle things that would be put in safe deposit?

A. Well, always give instructions as to how to handle those envelopes.

Q. Who gave you those instructions?

A. Well, just in different meetings we have discussed it, bellmen's meetings and so forth.

Q. And you had those before this time in October, 1954, before these articles disappeared?

A. I have to think that one over. Yes.

Q. Do you remember anything that was said at those meetings before these articles disappeared?

A. You mean in reference to checking them?

Q. Checking and how to handle valuables that were handed you by the guests?

A. Well, the only thing, they have told us to place them back there where they were and come back and
95 tell the cashiers as to where they are.

Q. And that's the only instruction you remember having received?

A. Yes, sir, it comes up very seldom that we do handle things like that.

Q. Who was the Bell Captain at the time Mr. Danziger checked in?

A. I believe Jack Lindley.

Q. Do you remember where he was when Mr. Danziger came in?

A. No, sir, I don't know exactly where he was at.

Mr. Bruggeman: That's all.

Cross Examination by Mr. Jerome B. Van Orman.

Q. At the time that Mr. Danziger gave you these grips or at the time you were checking them in Mr. Ryan's office, at any time during that period, that is prior to the next day or so, did Mr. Danziger ever declare to you the value?

A. No, sir.

Q. And did he ever tell you what was inside of those cases at that time?

A. No.

Q. And you didn't know what was inside those cases?

A. No, just like a pair of ordinary cases, that's all, one was a diplomat case and the other one sort of a valise type. Fact of the matter is, didn't look like sample cases at all, in the hotel term of a sample case.

Q. And he signed in front of you the top "A" (indicating)?

A. Yes, sir.

Q. This safety deposit box or whatever is behind the desk that the cashiers and clerks or managers have access to, you have never had any access to that yourself?

A. No, sir, you have to have two keys, one the cashier holds as a master key and the other one a different cashier.

Q. But you have never had anything to do with that at all or other—

A. No, sir, there is no way we could have anything to do with it.

Q. I think you stated that, I just wanted to clarify it.

Redirect Examination by Mr. J. A. Bruggeman.

Q. Do you remember just what he said to you when he came into the hotel and you wanted to take his two sample cases?

A. Yes, sir, he just said that he prefer to hand'e them himself.

Q. That's all he said?

A. Yes, sir.

Q. And from that you knew there was something in there that he didn't want other people handling?

A. Well, it has come up a lot of times, I mean even
97 gentlemen when you offer to help them with their baggage they don't even want you to carry their briefcase, I mean they are quite particular about certain things, I don't place any particular interest on it because it happens so often.

Q. Even when the doorman is carrying the other baggage?

A. Yes.

Mr. Bruggeman: I think that's all.

Mr. Van Orman: That's all.

• • • • • •

114 JACK LINDLEY after being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows, to-wit:

Direct Examination by Mr. J. A. Bruggeman.

Q. Will you tell us your name, please.

A. Jack Lindley.

Q. And where do you live?

A. Allendale Drive, Route 15.

Q. With whom do you live at that address?

A. My wife.

Q. And how long have you lived there?

A. About a year.

Q. How old are you?

A. Thirty-nine.

Q. What is your job with the Van Orman Hotel Company?

A. I am Bell Captain there.

Q. How long have you been Bell Captain?

A. Oh, about fifteen months.

Q. Were you on duty the night that Mr. Danziger checked in in October of last year?

A. Well, I worked until 7:30 or 8:00 o'clock, I don't know what time he checked in.

Q. Do you recall his checking in?

115 A. No, sir, not to my knowledge.

Q. Are you now acquainted with Mr. Danziger, would you know him if you saw him?

A. Probably wouldn't, it has been a long time.

Q. Have you ever had any talks with him about this matter of the disappearance of his cases?

A. On that day when he came back, yes.

Q. That is the next day after the disappearance?

A. Yes.

Q. You didn't have any talks with him before that?

A. No, sir.

Q. And you don't recall anybody talking to him at the time he checked into the hotel?

A. No, sir.

Q. You were on duty the afternoon that he checked in, though?

A. I work every day except two Sundays a month.

Q. What did Mr. Danziger say to you the day after about what had happened, if you can recall?

A. Oh, I couldn't remember exact words, he just seemed lost to understand how it disappeared.

Q. Did you ever see these cases in the room they were put in?

A. No, sir, I never seen them. I know I had to check every room in the hotel the next day, I won't forget that.

Q. At that time did they have any notices in the rooms

about having a safe in the hotel and what you were
116 supposed to do with valuables?

A. I don't recall any.

Q. Before this happened, the disappearance of these cases, had you given any instructions to the bellmen as to how they were to handle articles containing valuables?

A. Yes, if a case comes in, taken over to the Cashier and they give you a couple of receipts, the man signs it and put back in there.

Q. The only place that you had to put cases of valuables was in this room, Mr. Ryan's and Mr. Bushaw's room?

A. Yes, sir. There wasn't too many times that they used that, usually put things in a check room, except naturally on jewelry or something like that, or valuables they won't put it the check room.

Q. I don't quite understand you.

A. I said usually, they didn't use it too often.

Q. You mean most of the time they checked things in the ordinary check room?

A. Yes.

Q. And where was that located at that time?

A. That's downstairs and still in the same spot, right in the basement by the elevators.

Q. That is the place that is provided for checking baggage in and out?

A. Yes, sir.

117 Q. In October, 1954 when guests checked in valuable articles did you have any talk with them about the valuation on the articles?

A. No, I didn't.

Q. Or did you tell the people working under you to talk about the value of articles?

A. No. I didn't.

Q. You never issued any instructions to your men about that?

A. No, sir. Like I say, it was a rare occurrence that it ever was done, usually the Manager took care of it as a rule.

Mr. Bruggeman: I think that's all.

Mr. Van Orman: That's all.

Further Deponent saith not.

• • • • •

122 UNITED STATES DISTRICT COURT.

• • (Caption—862) • •

Examination of the plaintiff, Eichberg & Company, Inc., by James A. Neely and Harry Amols, held at the offices of Messrs. Hill, Rivkins, Middleton, Louis & Warburton, 96 Fulton Street, New York City, on Wednesday, December 12, 1956 at 10:30 o'clock A.M., pursuant to notice dated November 9, 1956, before Ray Elbaum, a Notary Public of the State of New York.

• • • • •

123 JAMES A. NEELY, having first been duly sworn by the Notary Public, testified as follows:

Direct Examination by Mr. McGowan.

Q. Please state your name and address.

A. James A. Neely, 95 Birch Drive, Pleasantville, New York.

Q. Mr. Neely, by whom are you employed?

A. Eichberg & Company.

Q. And in what capacity?

A. In charge of the diamond department.

• • • • •

138 *Cross-Examination by Mr. Van Orman.*

* * * * *

150 Q. Are there any instructions to him as to any safe keeping of these diamonds, or is that left to his discretion too? By that I mean that he has to keep them in a bank vault on the way, or anything like that. Are there any instructions?

A. All salesmen are instructed by the office that they never leave the goods unprotected. That's rule No. 151 1. It must go into safe keeping at all times. Whenever they leave it overnight, it must go in a bank vault or a jeweler's safe, or in a safe.

Q. They understand that from the home office?

A. Yes, that's rule No. 1.

Q. Is there a check by the company as to whether he is doing that?

A. That's up to him.

Q. He is instructed to keep them in safe keeping at all times?

A. That's rule No. 1. When it is in his possession he must never leave it without his possession. If he goes into a restaurant for lunch, he has to have it. Once that rule is broken, that salesman is through if we ever find that out. That of course is with responsible men.

I know Mr. Danziger personally, and I would say that is one thing he would never do.

* * * * *

173 IN THE UNITED STATES DISTRICT COURT.

* * (Caption—862) * *

Record of proceedings in the above entitled cause of action before the Honorable Luther M. Swygert, United States District Judge, at Fort Wayne, Indiana, on the 4th day of January, 1957, at 9:30 o'clock A.M.

* * * * *

176 (And thereupon the depositions of JAMES A. NEELY and HARRY AMOLS, witnesses on behalf of the plaintiff, together with the exhibits attached to said depositions, were admitted in evidence.)

The Court: They will be considered as read.

Mr. Bruggeman: At this time, also, your Honor, the plaintiff will offer in evidence the discovery depositions of two of the defendant's witnesses who are not available, Charles Bloodgood, who is in the penitentiary, and Jack Lindley, who is in California.

The Court: Any objection?

Mr. Van Orman: No objection.

The other witnesses are here, your Honor.

The Court: Admitted.

177 (And thereupon the discovery depositions of CHARLES BLOODGOOD and JACK LINDLEY were admitted in evidence.)

Mr. Bruggeman: There are a lot of them bound together, but only those two are being offered in this book. I assume we can pull them apart later.

The Court: You mean you want to separate them?

Mr. Bruggeman: I think that would be the only satisfactory way.

Do you have any objection to separating them?

Mr. Van Orman: No; you can pull them apart.

Mr. Bruggeman: I am inclined, your Honor, in view of

the fact that these witnesses are witnesses of fact, not merely of value, and to assist the Court in better understanding the testimony which will be produced by the witnesses themselves, either to read the depositions or have the Court read them before we put on the witnesses. It will make
our testimony much more understandable, if the Court
178 knows what is in them.

The Court: You better read them.

I don't think Mrs. Bretsch needs to take it down.

Mr. Bruggeman: For the purpose of understanding the deposition of Bloodgood, may we ask that Plaintiff's Exhibit "A," referred to in the deposition, be marked as Plaintiff's Exhibit 5 in this trial?

(Said instrument was marked Plaintiff's Exhibit 5, for identification.)

Mr. Bruggeman: We now offer in evidence Plaintiff's Exhibit 5.

Mr. Van Orman: No objection.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBIT 5 was admitted in evidence.)

Mr. Bruggeman: This is the deposition of Charles Bloodgood.

(And thereupon the deposition of Charles Bloodgood was read.)

Mr. Bruggeman: And now, your Honor, the deposition of Jack Lindley.

(The deposition of Jack Lindley was read.)

179 Mr. Bruggeman: Now, your Honor, we would like to call the room clerk, Mary Lou Moistner, as an adverse witness.

MARY LOU MOISTNER called as an adverse witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Bruggeman.

Q. Tell us your name, please.
A. Mary Lou Moistner.
Q. Where do you live?
A. 2609 Monmouth Drive.
Q. By whom are you employed?
A. Hotel Van Orman.
Q. How long have you worked for the Hotel Van Orman?
A. Approximately nine years.
Q. And just what is your job there?
A. Desk clerk, front office.
Q. How long have you been a room clerk there?
A. Approximately five years.
Q. Were you room clerk on this day in October, 1954, when Mr. Danziger registered in?
A. Yes, sir.
180 Q. At the time he registered in, did you have any conversation with him?
A. I don't recall having any conversation with him, no.
Q. Did you hand him the registration slip to sign?
A. Yes, undoubtedly.
Q. Do you have that registration slip?
(An instrument was produced, and marked Plaintiff's Exhibit 6, for identification.)
Q. I will hand you a card marked for identification as Plaintiff's Exhibit 6, and ask you if that is the registration card you refer to.
A. Yes, it is; that's my writing.
Q. By your writing, you mean the part in pencil?
A. Yes.

Q. Who wrote the part written in ink?

A. The guest writes it.

Q. That's Mr. Danziger?

A. That's right.

Mr. Bruggeman: We now offer in evidence our Exhibit 6.

Mr. Van Orman: No objection.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBIT 6 was
181 admitted in evidence.)

By Mr. Bruggeman:

Q. At that time, did you have any talk with him about the regulations of the hotel regarding guests and the care of their baggage and property?

A. Not that I recall, no sir.

Q. Did you talk to him about how to check in and out articles at the hotel?

A. I don't believe so.

Q. Did you talk to him about the use of these safety deposit envelopes that you have there at the hotel?

A. No.

Q. If anybody talked to him about that, who would it have been, on that evening?

A. The cashier on duty, Miss Ruby.

Q. Do you remember whether or not Mr. Danziger asked you for some safety deposit envelopes on this occasion?

A. No, I don't remember, sir.

Q. Do you remember referring him to anybody else to get some safety deposit envelopes?

A. I don't remember. It is quite possible that I would have. That was my busy period of checking in.

182 Q. Before that, Mr. Danziger had been a guest at your hotel?

A. Yes.

Q. You knew what his occupation was?

A. I knew that he was a salesman.

Q. What kind of a salesman?

A. I believe a jewelry salesman.

Q. Have you ever acted as cashier at the hotel?

A. Yes, sir.

Q. When the guest checks in and asks for some safety deposit envelopes, do you ever sign the part under the "A Check" on Plaintiff's Exhibit 5, beginning "Received by"?

A. No, not unless it is in the case of a small article that we put in our safe there at the desk. Then it is usually money. If we check the money ourselves, then we sign. Otherwise, we don't.

Q. In other words, you only sign when you check the money yourself?

A. When we know what is definitely being put in, yes.

Q. Now, Miss Moistner, let me ask you, whether or not at the time your deposition was taken—you remember when that was taken, in my office?

183 A. Yes.

Q. Whether or not I did not ask you these questions, and you made these answers (I am referring to page 71):

"Q. As far as you know, nobody ever signs this receipt under the heading 'A Check'?

"A. That's right, not that I know of."

Did you make that answer at that time?

A. Yes, I probably did.

Q. Did I also ask you this question:

"When you did it before did you sign the receipt?

"A. No, I never have."

A. Well, I haven't, not for a case of large merchandise of that sort.

Q. I didn't ask you that. I just asked you if at that time you didn't make that answer to that question, that you had never signed the receipt.

A. Possibly since then I have started, or I didn't understand the question. For large merchandise, I have never

signed the receipt; for smaller merchandise that we put in our personal safe, I have.

Q. So your testimony back in November, 1955, was 184 incorrect, then?

A. Evidently, yes, sir.

Mr. Bruggeman: I believe that is all.

Cross-Examination by Mr. Van Orman.

Q. Now, Miss Moistner, you stated that you knew Mr. Danziger was a jewelry salesman?

A. Yes.

Q. Did you know what type of jewelry salesman he was?

A. No, sir, I did not.

Q. In other words, he could have sold costume jewelry, so far as you know?

A. That's correct.

Q. Artificial jewelry?

A. Yes.

Q. He never explained to you at any time in his past stays in the hotel, or at that present time, about his business?

A. Not that I recall. I have never heard any mention of it.

Q. Now, at this time at the desk, on October 25, 1954, when he checked in at the desk at that time, what 185 time of day was that, about?

A. I believe the registration card was marked 4:30, or something of that sort.

Q. What sort of period of activity is that at the hotel at that time?

A. Very busy, between 4 and 6:30.

Q. Busy in what department?

A. Checking in department. It is our busiest time.

Q. Checking in for rooms?

A. Yes.

Q. Generally, you have many people at the desk at that time?

A. Well, as a rule, there are any number from ten to fifteen people standing at the desk at one time.

Q. At one time, during that period?

A. Yes.

Q. You say you don't recall any particular conversation with Mr. Danziger at that time?

A. No, I don't recall any conversation. As I say, I am very busy, and as a rule I don't have time for conversation.

Q. Now, did Mr. Danziger at that time say anything to you as to what the contents of these grips were,
186 what the grips contained?

A. No; I don't even remember Mr. Danziger checking the cases.

Q. You wouldn't remember if he told you anything about a value?

A. Well, I don't remember him telling me about a value.

Q. I will put the question this way:

If he had mentioned to you that the value of the contents of his grips was such and such a figure, can you state positively that he said that, or did not say that?

A. I would say that he did not.

Q. That he did not say that, you would be sure of that?

A. Yes.

Q. That he did not say that on that occasion?

A. I don't recall him saying it. It would be very improbable, with the number of people there.

Q. Now, then, in your deposition, you mentioned in your direct examination that the cashier is the one who gets the parcel slip signed; is that correct?

A. That's right.

Q. And Mr. Bruggeman asked you in your depo-
187 sition in the office:

"Q. When you did it before did you sign the receipt?"

And you answered:

"A. No, I never have."

That was when you were a cashier; is that correct?

A. I was a cashier on duty at certain times, yes.

Q. And you state that you have on occasions since that time signed it, or prior, is that correct; you have signed it?

A. I imagine it has been since that time.

Q. Now, that would be in the case, you stated, of only things you knew about; is that correct?

A. That is right; it is the verification.

Q. That is, situations like money being deposited?

A. That's correct.

Q. If you did not count the money, you wouldn't sign?

A. That's right.

Q. If you counted the money that was being deposited, you would sign?

A. That is correct.

Mr. Van Orman: I think that is all.

Mr. Bruggeman: That is all, your Honor.

188 (And thereupon the witness was excused.)

Mr. Bruggeman: Cleopatra Ruby.

CLEOPATRA RUBY, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Bruggeman.

Q. Will you tell us your name, please?

A. Cleopatra Ruby.

Q. And by whom are you employed?

A. Hotel Van Orman.

Q. What is your job at the Hotel Van Orman?

A. Cashier.

Q. How long have you been a cashier there?

A. Well, now it will be about seven years, sir.

Q. What are the duties of a cashier?

A. Oh, checking people out, doing our posting.

Q. Were you the cashier on duty at the time that Mr. Danziger checked in, in October, of 1954?

A. Yes, sir.

Q. Did you furnish two safety deposit envelopes for the use of his cases of a type similar to Plaintiff's Exhibit 5?

189 A. That is, those envelopes like that, sir, I gave to the bellboy.

Q. Who was the bellboy?

A. Charles Bloodgood.

Q. How did you happen to give them to the bellboy?

A. He asked for them for two cases.

Q. And you handed them to the bellboy to have them executed?

A. Yes, sir.

Q. Now, at that time what was the practice of the hotel about what you did with articles that the bellboy would come up and get these safety deposit slips for?

A. Generally, the man who has the cases comes up to the cashier, but this gentleman didn't.

Q. What happens when they come up to the cashier?

A. They come up to the cashier and say they have two or more cases, the cashier gives them the envelope, and they sign in front of the cashier.

Q. Then what does the cashier do?

A. I generally put them on the cases . . bellboy handles them from there on.

Q. That was in accordance with the only instruction given you at that time about handling cases of this

190 type?

A. Yes, sir.

Q. Now, back in October, of 1954, was there any limitation on the value of articles you were permitted to accept?

A. What do you mean by that?

Q. Well, did the hotel say to you that you were not to accept articles above a given value?

A. Yes, but if the value is not given, sir—

Q. My question simply is this: At that time had you been told not to accept things over a certain value?

A. No, sir.

Mr. Bruggeman: That is all.

Cross Examination by Mr. Van Orman.

Q. You state that on this day of October 25, 1954, on or about the time of 4:30 or 5, Mr. Danziger checked into the hotel. Did you have occasion to see him at that time?

A. No, sir.

Q. Did you have any conversation with him at all?

A. No, sir.

Q. Did he come over to the cashier's window?

191 A. No, sir.

Q. Now, where is the cashier's window in connection with the front office desk?

A. It would be left of the front office.

Q. Is it in the same area, I mean, there is a wall, there is a desk, a big desk, that goes in front of the whole—

A. Yes, but there is a window that is to the left of the front office, what we consider as the front office.

Q. How many feet away from where the room clerk stands?

A. Well, I don't know, sir, when the gentlemen checked in, whether they were—

Q. Well, I mean, where the room clerk generally stands to check people in, and where you stand in doing your work.

A. Oh, I imagine it would be about ten feet.

Q. About ten feet. There is no partition between?

A. No, sir.

Q. You handed these checks to the bellboy?

A. Yes, sir.

Q. Mr. Danziger never came to your desk at all?

A. No, sir, he did not.

192 Q. Now, tell me about the procedure of a guest, if a guest comes to you and tells you that he wants to check some money, for example, do you have a safe in the hotel for that purpose?

A. Yes, for money, sir, we do.

Q. Where is that safe located?

A. Well, that is located in the front office. That would be to the right of where the room clerk is.

Q. You have keys?

A. Yes, sir; we have a master key and another key.

Q. Are you the person in charge of handling such deposits?

A. I am if I am on duty. My hours are from 3 to 11.

Q. And what do you do in a situation like that?

A. Well, we give the gentleman the envelope, he signs it, we initial it, the date it was put in there, the room the gentleman is registered in, and he takes the lower slip and signs that when he comes back and claims his envelope.

Q. Your hours of work in the hotel are what?

A. 3 to 11 at night.

Q. 3 P. M. to 11 P. M.?

A. Yes, sir.

Q. You were working on October 25th, when Mr.

193 Danziger checked in?

A. Yes, sir.

Q. After the bellboy took the two checks from you, did you ever see the cases again?

A. I didn't see the cases at all, sir.

Q. You didn't see the cases?

A. I didn't see the cases.

Q. So you didn't know what was in the cases?

A. No, sir.

Mr. Van Orman: I think that is all.

Redirect Examination by Mr. Bruggeman.

Q. At that time the assistant managers in charge of operations were Mr. Bushaw and Mr. Ryan?

A. I beg your pardon?

Q. At that time in October, that we are talking about, the two assistant managers that ran the hotel and gave the instructions were Mr. Bushaw and Mr. Ryan?

A. They were the assistant managers at that time, sir.

Q. This safe that you speak of, how big was it, or is it?

194 A. Oh, it's a small safe.

Q. Well, in inches?

A. I can't tell you the dimensions of it, sir.

Q. Is it more than a foot square?

A. Well, I imagine it is more than that, but I can't give you the dimensions of it, sir, because I never asked what the dimensions were.

Q. Will it hold satchels or valises?

A. No, sir.

Q. As I understand you, at that time when somebody brought in cases too big to go in this vault, you put these safety deposit envelopes around the handle, and then gave them to the bellman to take care of from then on?

A. I have previously; I did not for this gentleman, sir.

Q. I mean, that was your practice and the instructions under which you operated?

A. That's right.

Mr. Bruggeman: That is all.

195 *Recross Examination by Mr. Van Orman.*

Q. Those instructions, who gave you those instructions to handle–

A. Well, the managers—that is, the cashier is the one who put them on the grips, or the cases, rather.

Q. Put the envelopes, the checks, on the grips?

A. Yes, and then the bellboy from then on handles them.

Q. The bellboy handles them?

A. Yes. I never handled the cases.

Q. You didn't handle them?

A. No, sir; I never handled the cases.

Q. When the guest came with his claim check, did you have anything to do with that?

A. Well, if he came to the cashier and signed it in front of the cashier, then they would go where the cases were.

Q. But you had nothing to do with putting the cases away?

A. No; no.

Mr. Van Orman: That is all.

(And thereupon the witness was excused.)

196 EDMUND J. DANZIGER, a witness on behalf of the plaintiff, having first been duly sworn, testified as follows:

Direct Examination by Mr. Bruggeman.

Q. Will you tell us your name, please?

A. Edmund J. Danziger.

Q. Where do you live, sir?

A. Bloomfield Hills, Michigan

Q. By whom are you employed?

A. Eichberg and Company, Incorporated, New York City.

Q. That is the plaintiff in this case?

A. Yes, sir.

Q. What is their occupation?

A. Importing diamonds, and we do mount a little merchandise that we sell.

Q. What is your occupation?

A. I am a salesman for them.

Q. What territory do you serve, roughly?

A. Michigan, Indiana, Kentucky, part of Ohio.

Q. Does your territory include the city of Fort Wayne, Indiana?

A. Yes, sir.

197 Q. How long has it included the city of Fort Wayne, Indiana?

A. I have been with the firm since July 1st, 1952.

Q. What was your business before going to work for the plaintiff?

A. I was in manufacturing business for myself.

Q. Had you ever had any previous experience in the jewelry business before going to work for the plaintiff?

A. I have been in the jewelry business for thirty years.

Q. Going now to the day in question, were you at home the night before?

A. Yes, sir.

Q. Tell us what you did that morning.

A. I left real early from where I lived to get to my bank vault where I keep my sample line downtown in Detroit, which I can pick up around 9 o'clock in the morning, after which time I left and drove to Monroe, where I have three customers, and made three calls; from there I drove directly to Fort Wayne.

Q. Will you tell us what route you followed in the city of Fort Wayne, as best you can?

198 A. 24 right into town, and right down—I think it is Washington Boulevard, to Harrison, and turned right, right up to the hotel.

Q. What hotel was that?

A. Hotel Van Orman.

Q. Did you have a reservation there?

A. Yes, sir.

Q. Had you been stopping at the hotel before?

A. Since I have been with the firm.

Q. You were a regular customer?

A. Yes, sir.

Q. When you arrived at the hotel, tell us what happened.

A. The doorman helped me; I had my bags in the back of the car.

Q. What door did you stop at?

A. That would be Harrison Street—not Berry, the other street; is that Harrison? Yes, sir. I got out of my car, went to the back of the deck and opened up; I said to the doorman, "You can take this big bag, which is my personal bag. I will take the other two bags". I took my two bags, he took my personal bag; I slammed the deck closed; I walked ahead; I think he opened up the door, but I am not positive; I walked in and went right to
199 the desk with my two sample cases.

Q. On the way there, did you meet anybody?

A. On my way in the bellboy asked to help me. I said, "I will take them myself," and went right to the desk to register.

Q. Then what happened, sir?

A. After I registered, the bellboy came up. I said, "I want to put these two bags in the vault". After which time he went to the cashier's desk, wherever it was, and got two envelopes. We walked over to a desk, which I should say was a little bit on the left, where I took the two envelopes and signed the top of each one of them.

Q. By that, do you mean this part marked "A Check" on Plaintiff's Exhibit 5?

A. Yes, sir, right on the top there. I don't know whether he ripped the bottom off, or I ripped the bottom off, it is done all of the time, so I got my two receipts for my two bags, the bags were put away, and after that, why, I don't quite remember what happened after that until the next morning, when I came down to get my bags.

(Instruments were marked Plaintiff's Exhibits 7 and 8, for identification.)

200 Q. I hand you two checks marked Plaintiff's Exhibits 7 and 8, and ask you if you will tell me what those are.

A. These are the two receipts, or facsimiles of them, that I received when I checked my two bags.

Mr. Bruggeman: The plaintiff now offers in evidence Plaintiff's Exhibits 7 and 8.

The Court: Admitted.

(And thereupon PLAINTIFF'S EXHIBITS 7 and 8 were admitted in evidence.)

By Mr. Bruggeman:

Q. Before going to your room, did you accompany the bellboy anywhere?

A. Yes, the bellboy took my two bags to what was an office there, and I walked up to, oh, I should say maybe a foot or two before the office, and I saw him go to the right with the two bags, and that was the end.

Q. When he came out of there, was he empty-handed?

A. I don't remember seeing him coming out, sir.

Q. Then where did you go with him?

A. I waited outside, and he came back and said, "Which is your personal bag?" Which I pointed to, right over there, and then I was roomed.

201 Q. By that, you mean he took you up to your room?

A. Yes, sir.

Q. At any time while you were a customer of the hotel

did anybody advise you that there was no vault for the safekeeping of your sample cases?

A. No, sir.

Q. What instructions do you receive from your employers about taking care of your sample cases?

A. They must be put in either a safe or vault or some place where they are attended, and I must receive a receipt for each bag.

Q. Have you followed those instructions faithfully during your employment by the plaintiff?

A. Yes, sir.

Q. What was in your bags, can you tell us, at the time you turned them over?

A. All mounted jewelry, diamond rings, diamond watches, I think diamond attachments, I don't quite remember, but all diamond mounted goods; I had no loose diamonds with me at that time.

Q. Can you identify the pieces that were in there?

A. That would be very difficult. I could tell you whether we made something like that, but we wouldn't be the only one that would have something like that, 202 so it would be difficult to identify.

Q. Can you tell us what the inventory was of articles in those two bags?

A. I didn't know. The inventory was about $32,000.

Q. Will you explain to the Court your procedure in handling these articles, so that the Court understands what you mean when you say "I don't know what was in them"?

A. I don't know from day to day exactly what my inventory is because the office keeps sending me new samples practically every week. When I carry loose diamonds, I deliver the loose diamonds. The mounted goods, I do not deliver. So when I have loose diamonds, and deliver some each day that I do business, it is difficult for me to tell at any one time exactly how much goods I have in dollars. I have a perpetual inventory at all times as to what

I have, but I don't add them up to find out what the total is. However, the office keeps an exact record of what my inventory is each day in dollars and cents, in other words, it is a running inventory.

Q. Have you examined these inventories which have been introduced in evidence as Plaintiff's Exhibits
203 1, 2 and 3 of the depositions of the two men in New York?

A. I haven't, no, sir.

Q. How often are physical checks made of your sample cases?

A. Every month.

Q. When was the last physical check made before this occasion in October, if you recall?

A. Yes. I might be wrong; I would say July or August. At that time I was not—yes, every month; excuse me; that was '54; I went with them in '52. Every month we have to send in an inventory of our merchandise which we have.

Q. So that you had sent one in within a month before that?

A. It has to be in by the 26th of the month.

Q. So you had sent one in, it was in there before the 26th of October?

A. I believe so, yes.

Mr. Bruggeman: You may cross-examine.

204 *Cross-Examination by Mr. Van Orman.*

Q. Mr. Danziger, how often do you get to Fort Wayne?

A. About four times a year.

Q. Four times a year; and you said you had stopped at the Hotel Van Orman in Fort Wayne since you had been employed by Eichberg and Company?

A. Yes, that's right.

Q. That is since 1952?

A. That's right.

Q. So it had been approximately eight times?

A. Not necessarily. Sometimes I might come in early in the morning and go out that evening. I wouldn't know the number of times. But I make the town four times a year.

Q. You state that you don't know the inventory. You mean you don't add up the inventory each night?

A. In dollars. I know numbers; in other words, I can tell you at one time how many 2806's or 2804's, because I keep a perpetual inventory myself. The main thing with me is to have the merchandise, not to know how much in dollars. If I have four 2806's, and it corresponds with the office's 2806's, I am all right.

205 Q. The home office is in New York, is that where it is?

A. That's right.

Q. They have a perpetual inventory of the dollar value?

A. That's right.

Q. You have an inventory yourself of what the contents are, but not of the dollar?

A. I could add them up.

Q. You could, but you don't bother?

A. Because it is unimportant as to how much goods I have in dollars, as long as I have the quantities.

Q. Now, this physical check every month, is that physical check made by you alone?

A. Yes, and I send it to the office.

Q. Now, do you recall when was the last time the New York office had actually taken a physical inventory of your merchandise?

A. I am not sure, sir. I was in the office, I believe, in July, of that year. At this time now, for the last two or three years, we have taken an inventory every month, and I think it covered that month. I wouldn't want to swear and be wrong.

Q. Well, you were in New York at that time for
206 what occasion?

A. I go in twice a year.

Q. Well, in July, 1954, that is, the July preceding this October when the loss occurred, you were in New York?

A. I believe so.

Q. Well, they stated in New York that you were there because of the death of a relative, was that the reason, or illness of a relative, and didn't come into their office.

A. I have to think back.

Q. I am not trying to confuse you. I just wanted to find out the last date.

This is what the deposition contained on that matter--

A. Oh, you mean this past year, sir?

Q. No, I beg your pardon; in 1954; I am referring back to 1954.

A. I will have to think just when I was in there at that time.

Q. I was thinking of when the last physical check was made of the inventory by the employer.

A. In 1954?

Q. In 1954, prior to October, the day of the theft
207 or loss.

A. I don't just remember.

Q. Well, would the date of January, in 1954, the first part of the year, would that be approximately correct?

A. Oh, no, no; it had to be much oftener than that.

Q. It had to be oftener than that?

A. Oh, yes, yes; in fact, I go in every June or July. That's a minimum of two times a year; I go in sometimes three. I don't know whether I was in either June or July, of that year.

Q. They stated in their deposition, the employer, Eichberg and Company, that you were in New York in July, of that year, but you didn't come into their office and they didn't take any physical check at that time.

A. I see. I don't quite remember.

Q. Your inventories that you speak of every month, the contents of your sample cases are checked by you every month; is that correct?

A. In other words, they send us an inventory list, a sheet, to fill out. We send those into the office. If there is any discrepancy, or anything like that, we catch it
208 quickly, rather than to visit for too long a period.

Q. I wanted to go over the instructions that Eichberg and Company give you in connection with depositing your sample cases, the safeguarding or the care that you should exercise in the safeguarding of these cases.

What do they tell you?

A. We are allowed to deposit it in any hotel that has a safe or vault or any place that is attended and not left alone. Some hotels do not have vaults; they keep it in the cashier's room, or something like that, but it is attended at all times.

Q. Well, now, in Detroit, that's your home, that's where you live?

A. Yes, sir.

Q. You keep them in a bank vault; is that correct?

A. Yes, sir.

Q. At all times. You don't have them with you in person?

A. That's right.

Q. Now, when you get into other cities in your territory—

A. I either keep them at a hotel, sir, or at a customer's.

209 Q. At a jewelry store; is that right?

A. That's right.

Q. You keep them at a jewelry store; they have a safe?

A. If they have facilities. Not every store does.

Q. Well, now, does any jewelry store in Fort Wayne that you call upon have facilities?

A. I believe Kerber's do; I am not positive.

Q. Have you ever kept your sample cases in any jewelry store in Fort Wayne?

A. No, sir.

Q. You have not?

A. No. Kerber's would be the only one, I believe, that have facilities, and I haven't asked them.

Q. Kerber's is a customer of yours, you do sell Kerber's?

A. Once in a while; not too much.

Q. Well, now, you talk about your home office giving you merchandise and samples, sending it to you constantly. Where do they send them to you?

A. Always to a customer.

Q. Always to a customer. Do they ever send it to a hotel, as such?

A. No, sir.

210 Q. They do know that you are coming in to a certain hotel?

A. They know where I am every day in the year.

Q. But they send it to the customer?

A. That's right.

Q. And then the jeweler gives it to you upon your arrival?

A. They will write a letter to the customer, "We are taking the liberty of sending you a package for our Mr. Edmund J. Danziger, who will be in your town shortly. We will appreciate it if you will keep this in your safe until he comes."

I know them all pretty well. I know they have a package for me because I have received a copy of the letter that the package is going to be at the XX store, or something like that, and then I go in, and say, "Eddie, have you got a package for me? Thanks very much."

Q. And then you take it and put it in your sample case?

A. That's right.

Q. Now, you stated on your examination that these cases contained watches and rings?

A. That's right.

211 Q. This was sample merchandise that you had for sale?

A. That's right.

Q. You would sell it to your customers?

A. Those are mostly orders. I believe I had about seven or eight duplicates at that time. At the fall of the year we do not have much delivery of mounted goods, because we keep it all in the office to fill orders. But I might have had 6, 7, 8, or 10 pieces for delivery. The rest of it, we just took orders on.

Q. You just took orders as you walked in?

A. That's right; then send the orders in to the office.

Q. You have a sample with you; you could sell the sample?

A. Very seldom. Oh, no, we never do that.

Q. You never do that?

A. It is the only sample. Very seldom.

Q. You just keep the sample, because it is the only one?

A. If you sell the sample, then you are out of it yourself.

Q. If you sell the sample, you have to get it from

212 the home office; is that right?

A. And it takes you four, five, or six weeks sometimes to get another sample. Of course, that's the time when we are very busy and we don't have much extra stock.

Q. I see. This consisted of watches and rings?

A. Watches and rings. And we might have had a few attachments; I don't recall whether we had them at that time. We make them now, have had them a couple of years, but whether we had them at that moment, I am not sure.

Q. You said that you had been in the jewelry business for thirty years, and you worked for Eichberg and Company since 1952. Were you self-employed in the jewelry business prior to that?

A. I was in business for myself for a while, and I also was with a brother of mine in New York for about twelve years.

Q. Were you a traveling salesman, on the road?

A. I traveled all of the time.

Q. All of the time. That was your capacity with Eichberg and Company in 1954, also?

A. That's right.

Q. Will you tell us what the size of these cases was?

213 A. I had two cases, sir; one was about this long and about that thin (indicating).

Q. That would be about?

A. Oh, I should say about five inches.

Q. Five inches thick?

A. Yes.

Q. And in length about what?

A. Oh, maybe 30 inches, would you say; 28 to 30 (indicating).

Q. Yes.

A. It was made specially so it wouldn't look like an ordinary jewelry case. We do that, we try to have them look a little different. Plus a very substantial brief case that could be locked, with a good lock. It was made to order by Crouch and Fitzgerald. All our cases, good cases, are made to look a little different.

Q. This brief case was about the same size?

A. The brief case would be a little smaller, oh, I should say a foot and a half.

Q. A foot and a half, about?

A. Yes, very well built, with about four pockets.

Q. Why do you make them look a little different?

214 A. We just don't want to be so obvious.

Q. So obvious?

A. To everybody on the street that we are in the jewelry business.

Q. Now, you told us about the next morning, after the disappearance. When did you first discover the loss?

A. Well, as usual, I came downstairs about nine o'clock. I don't recall who the chap was that was up front at that time. I took my two slips out of my wallet, where I usually keep them, close to me, right in here (indicating), took them out, was prepared to sign them; I said, "I would like to get these two bags"; after which time he walked into the office, and came out, evidently didn't come out too soon, evidently looked around; he came out, and he said, "The bags aren't there"; he said, "Maybe they were put down in the parcel room"; so I took my two slips back, and I went downstairs in the parcel room with him, and we looked all over; there was nothing there; at which time we came upstairs, and I said to the chap, I said, "I think we better talk to the manager, or assistant manager".

Q. Then did you get in touch with the assistant

215 manager?

A. Yes, the assistant manager came out, and the first thing he did was look over all of the registrations of everybody who had registered a little bit before me and a little bit after me the night before, or evening, and the bellboy or captain, who he was I don't remember, he and I went through all those rooms to see if, by mistake, the bags were taken to any of those rooms. They were not there. I came downstairs, I said, "Well, we better get in touch with the police," which they did.

Q. And then the police came into the picture?

A. Yes, sir.

Q. As far as you know, has any trace been found of the missing jewelry?

A. No, sir, not that I know of.

Q. No one has been apprehended in connection with the theft, that you know of?

A. No, sir, not that I know of.

I did hear, the next time that I came to Fort Wayne, that one of the bags, empty bags, was found in the river, something like that, but that's all I heard; only hearsay. I know of nothing.

Q. Do you recall the assistant manager's name, was
216 it Mr. Bushaw or Mr. Ryan?

A. I saw both of them so much after that that I am very frank to tell you that I am not sure. I think it was Mr. Ryan. I might be wrong.

Q. This is Mr. Ryan here. Was it this gentleman?

A. No, it was the other gentleman.

Q. It was the other assistant manager?

A. I am pretty sure, but as I said, I had so much to do with both of them for three days—

Q. Do you recall any conversations that you had with Mr. Bushaw at that time?

A. Well, he did his best; I went into his office with him; and they called the police department; and detectives said they would be right over; and I stayed right in the office until they came. They came into the office, I think two of them, a Concino, or something like that, and another chap, came in, and went through the whole procedure as to what, how, and when.

Q. Did you make a call at that time, a telephone call, to New York, to your home office?

A. Well, I didn't until they asked me what the value of the merchandise was, and I said I didn't know exactly what was in the bag; I said I could find out from the
217 New York office, and I will have to call them anyhow, at which time I did call our office. And they had to look it up, too, so they called back.

Q. You called them to get the value, to give it to the—

A. That's right.

Q. Did you tell the room clerk, Miss Moistner, anything about what was in the grips?

A. I never do.

Q. You never do?

A. No.

Q. That is for your protection, to keep the people—

A. I never talk to anybody any more than I have to; I don't sit in the lobby; I don't mingle with anybody; I just keep myself on the side at all times; very seldom go out with anybody.

Q. You never disclose what the contents of your bags are?

A. No, sir.

Q. To anybody?

A. To anybody.

Q. Did you at any time prior to your registration, or while you were registering, in giving these grips to the bellboy, did you have occasion to contact, or did you contact or see either one of the assistant managers, Mr. 218 Ryan or Mr. Bushaw?

A. No, sir.

Q. Did you contact or have occasion to see the manager at that time of the hotel, Mr. Harold Van Orman, Jr.?

A. No, sir.

Q. The first time you were personally acquainted with or contacted Mr. Bushaw or Mr. Ryan was the following day, is that correct, when the loss was discovered?

A. That's right.

Q. You didn't tell the bellboy, either, what your contents were?

A. I said, "I want these put in the vault".

Q. "I want these put in the vault"?

A. Yes.

Q. You didn't tell him the value?

A. No, sir. I couldn't have told him the value because I didn't know it.

Q. You signed the vault check there?

A. Yes, sir, the top of it.

Q. The top of it. The bottom part would be signed by you when you—

A. When I get the merchandise.

219 Q. That was the only thing that you signed, was it?

A. That's right.

Q. When you say you followed the bellboy, after he took these bags, up to the door of the manager's office, did you see the sign on it saying "Manager's Office," did you notice that?

A. I didn't notice.

Q. You didn't pay any attention?

A. No, sir.

Q. What did you see him do, just see him go in the doorway?

A. I saw this bell captain walk in the door; there was a young girl—

Q. You mean the bellboy?

A. The bellboy, excuse me; I saw the bellboy take my two bags, and I walked up a short ways with him; there was a young lady sitting at the desk there right in front; I don't know exactly how far I walked, I should say maybe a foot or two feet, I don't just recall; and I saw the bellboy take my bags and go over that way (indicating). I don't just recall seeing anything else.

Q. Do you recall his coming out again?

220 A. I don't recall his coming out again, except that I turned around and walked over to my personal bag, because I knew he was coming to room me and he would want to know where the personal bag was.

Q. Had you ever been in that particular manager's office before?

A. No, sir. I had no credit card with the Van Orman Hotel, never cashed a check, so I really had no occasion to go in.

Q. Mr. Amols, in his testimony in New York, of Eichberg and Company, when he was describing your instructions, said his instructions to you were that you leave the suitcases for protection in a bank vault or a jewelry store, or try to leave it in a place where you see that they have proper protection.

Was that in substance what he told you at that time?

A. Yes, sir.

Q. Well, now, did you ever see the vault that the hotel had, the Hotel Van Orman had?

A. No, sir.

Q. You had never seen it prior to this?

A. No, sir.

Q. This vault?

A. No, sir.

Q. Let me ask you this: What other cities do you 221 make on your tour in Indiana?

A. Hotel Lincoln, at Indianapolis; the Oliver, in South Bend.

Q. Well, now, do you keep your sample cases in the safes in those hotels?

A. Yes, sir.

Q. Have you ever seen their safes?

A. In the Lincoln, I have. In South Bend, the Oliver, the bellboy takes me over to the cashier's office, I sign two slips, she gives me the bottom; he takes it in the back of the cashier's office. Which is what I thought was at the Van Orman, also, that they had a safe in the back. I understand the Oliver does have a safe in the back of the cashier's, where they put the bag. However, I haven't seen it. Nobody is allowed in the back.

Q. Have you ever seen the safe they have at the Van

Orman, back of the cashier's desk, where they do store articles?

A. I don't recall.

Q. That's the one that was described in the examination.

A. Almost every hotel has those, with little boxes about this big (indicating).

222 Q. About a foot and a half square?

A. I don't recall, but every hotel has those, for guests, small envelopes, and so forth.

Q. You thought there was a safe inside of the room?

A. I thought, going over to the right, there might be a safe in the back there.

Q. That room was the manager's office?

A. Off to the right, way over.

Q. Off to the right?

A. Yes.

Q. Do you ever inquire, at any of the hotels you stop at, or jewelry stores, just what their safe is, how large it is, whether it is controlled by combination or keys, or where it is located, do you ever ask about that, or are you curious about that, in these places?

A. No, because if they are in a safe, or attended, most of them wouldn't be locked, anyhow, because the hotels usually keep them open twenty-four hours a day for people coming in and out, so I wouldn't particularly ask whether they had it locked, what kind of lock, or anything else.

223 Q. Well, like in the case of a fire, has it ever dawned on you in your travels that you would like to know at least where the location of the safe is?

A. They wouldn't let me in there, anyhow.

Q. They wouldn't take you back in there, but did you ever inquire, to let you know where the safe was?

A. I have never asked.

Q. You never asked?

A. Most places, you know just about where it is. If anything happened, all you have to do is run downstairs and run in the back; that's where the safe is. It would take a pretty big fire one of these days to do the merchandise—

Q. Well, what made you think that the hotel there had a safe large enough for the cases?

A. Every jewelry salesman who stays in the hotel thinks there is a safe back there, or did until my accident.

Q. Is that what made you think that there was?

A. Yes. My predecessor stopped there.

Q. Just hearsay about it, more or less?

A. Yes.

Q. You have never seen the safe?

A. No, sir.

224 Q. Just been an assumption?

A. My predecessor stopped there, too.

Q. And you just gathered from him, I mean from his conversations, that there was a safe?

A. Yes, sir.

Q. Then your connections, your contacts, with the hotel employees on this occasion in October, of 1954, were with the doorman, whom you did not give the cases to, then with the bellboy, the room clerk who registered you; you didn't see any other employees, you didn't talk with any?

A. No, sir.

Q. You don't tell anyone but your home office when you are coming into the town?

A. The home office and my wife are the only ones who know where I am.

Q. You said you went down to the check room, down to the basement of the hotel, to check?

A. Yes, sir, the next morning.

Q. The next morning?

A. Yes, sir.

Q. Was there baggage down there?

A. There weren't too many bags.

Q. That's where they store their bags?

225 A. Parcel check room, that was.

Q. You checked through that?

A. That's right.

Q. And then you checked into this office where you thought the safe was, the manager's office, afterwards?

A. That's right.

Q. When you were talking to the assistant manager?

A. That's right.

Q. I notice on the registration card which you signed that you don't put anything down about your firm's address.

A. Purposely.

Q. Purposely; is that done purposely?

A. Yes, sir.

Q. In other words, the more you conceal, the better for you, as far as you are concerned?

A. That's why I don't talk to anybody in the lobbies, go out with anybody that I don't know, and just keep by myself.

Q. You never talked with this girl, the room clerk, Miss Moistner, about your jewelry cases, prior to coming?

A. Even my reservation is made under my own 226 name. We have special cards.

Q. You sent in a card, you say, with—

A. My own name on the card.

Q. You made a reservation in the hotel, is that what you mean?

A. That's right. In other words, the cards are all printed, "Please reserve single room, Edmund J. Danziger," and my home address in Michigan. The firm is not mentioned. We never use firm stationery in writing to anybody.

Q. Just an individual checking in?

A. That's right.

Q. So that no one at the hotel would know that you had any connection with the firm?

A. That is right.

The Court: We will take a short recess.

(A short recess was taken.)

By Mr. Van Orman:

Q. Just one or two more questions, and then I will be through, Mr. Danziger.

At the time of your checking in, when the bellboy was taking these grips into the office, and you were following him, did you notice anyone in the office, outside of you 227 stated a girl was sitting there at the desk, was there any other person in there?

A. I don't recall, no, sir.

Q. Do you recall the next morning, in talking to one of the assistant managers, Mr. Bushaw, your conversation with him when you said that the bellboy had placed the grips in the office, do you remember telling him that?

A. I don't.

Q. Pardon?

A. I don't.

Q. You don't remember that?

A. No, sir.

Mr. Van Orman: I think that is all.

Redirect Examination by Mr. Bruggeman.

Q. You mentioned the fact, Mr. Danziger, that after this was reported the police were called in. Do you recall that?

A. Yes, sir, I was there.

Q. Along with the other witnesses, did you submit yourself to the lie detector test?

A. I did, sir.

Q. During the period you were registering at the hotel, before you turned them over to the bellboy, did
228 you take any precautions to see to it that the bags were not switched?

A. The two bags were right between my two legs at all times.

Q. By "at all times," you mean until you surrendered possession?

A. That's right.

Q. Mr. Van Orman asked you the question about why you thought there was a safe in this room.

Did you, on this particular occasion, follow the same procedure that you did on the other occasions when you stopped at the Van Orman Hotel?

A. When the bellboy came up, I said, "I want these two bags put in the vault," after which he took the two bags and went through the procedure of getting the two envelopes and pasting them on and taking them.

Q. Did anybody ever tell you before the occurrence that they were not being placed in a vault?

A. No, sir.

Q. On these other occasions when you were in the hotel, did you deal with room clerks and cashiers?

A. Bellboys and whoever registered me behind the desk.

Q. And when you talked to these people behind the
229 desk, did you give them the same instructions about taking care of your property?

A. I never had to say anything to them, because I had to tell the bellboy that I wanted these put in the vault, and he went through the procedure of getting the envelopes.

Q. They always referred you to the bellboy?

A. Well, the bellboy would start to put them away, and I would say, "I want these put in the vault," and he would go over and get the envelopes.

Mr. Bruggeman: That is all.

(And thereupon the witness was excused.)

Mr. Bruggeman: We rest, your Honor.

(And here the plaintiff rested.)

And thereupon the defendant, to support and maintain the issues on its behalf, introduced the following evidence:

Mr. Van Orman: Mr. Horning.

RAY C. HORNING, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

230 *Direct Examination by Mr. Van Orman.*

Q. Will you state your name, please?

A. Ray C. Horning.

Q. And your address, Mr. Horning?

A. My home address?

Q. Yes.

A. 2020 North Anthony.

Q. In Fort Wayne?

A. Fort Wayne, Indiana.

Q. What is your occupation, Mr. Horning?

A. Catering manager, Hotel Van Orman.

Q. And on the date of October 24th or 25th, were you catering manager—October 24th or 25th, 1954?

A. Yes, sir.

Q. How long had you been employed by the Van Orman Hotel?

A. At that time, two years.

Q. And would you explain your past hotel experience, prior to that?

A. I had been in the hotel business for over thirty years before I came with the Van Orman, connected with the Hotel Keenan.

Q. Been in the hotel business here in Fort Wayne?

A. That's right.

Q. And in what capacities have you been in the hotel business?

231 A. Well, I have been clerk, assistant manager, manager, general manager of two hotels, the Anthony—the old Anthony, and the Keenan.

Q. Now, referring to this day, on or about 4:30 or 5 o'clock, at the time in October, 1954, when Mr. Danziger checked into the Van Orman Hotel, at the time that these sample cases of Mr. Danziger's disappeared, do you recall that occasion?

A. Yes, I do.

Q. Did you have any occasion to talk to Mr. Danziger about that situation at any time?

A. No, I didn't.

Q. Now, calling your attention to the afternoon when he checked in, did you happen to be in this room called the manager's office?

A. I was at Mr. Ryan's and Mr. Bushaw's desk, making a telephone call.

Q. You were at Mr. Ryan's and Mr. Bushaw's desk making a telephone call, in this manager's office?

A. That's right.

Q. And that is right behind the desk, there off the side of the front office desk—

A. That's right.

Q. —on the main floor, the lobby floor?

232 A. That's right.

Q. And who else was in the office at that time?

A. Esther Bowley, the girl who makes the menus and does Mr. Ryan's secretarial work.

Q. The secretary of Mr. Ryan was in the office at that time?

A. Yes, sir.

Q. Now, do you recall the bellboy, Charles Bloodgood, bringing in the grips of Mr. Danziger?

A. Yes, I do.

Q. Would you tell us about that, what happened?

A. Well, the boy came in with the two grips and placed them over by the air conditioner, or by the post by the air conditioner, and set them down, secured two depository envelopes on them, and walked out.

The Court: Will you talk a little bit louder, please?

(Photographs were marked Defendant's Exhibits "A" and "B", for identification.)

By Mr. Van Orman:

Q. Mr. Horning, I will show you a picture of the entrance to the manager's office. Are you familiar with that?

233 A. Yes.

Q. It was in that office that you were speaking about on that occasion?

A. Yes.

Q. Here is another picture taken from the doorway of the manager's office.

A. Yes, sir.

Q. Could you show me where you were sitting at that time?

A. Right in that chair, right there (indicating).

Q. Where did the bellboy place the grips?

A. Right in there, about where that—

Q. This is the air conditioner right here?

A. Yes, sir; right in here, right in this area (indicating).

Q. That air conditioner was located there in October, 1954?

A. That's right.

Q. The desk was there?

A. Yes. The coat rack was there.

Q. That is a picture of the office at that time?

A. Yes, sir, it is.

Q. The bellboy put the bags right here?

A. Right in this area, right here, right between
234 the post and that air conditioner.

Mr. Van Orman: I would like to introduce these.

Mr. Bruggeman: No objection.

The Court: Admitted.

(And thereupon DEFENDANT'S EXHIBITS "A" and "B" were admitted in evidence.)

By Mr. Van Orman:

Q. Now, on that occasion, when the bellboy placed them down, did you see Mr. Danziger?

A. I saw a gentleman standing in the doorway.

Q. Well, the gentleman standing in the doorway, was that gentleman Mr. Danziger?

A. Yes.

Q. How far did he come into the doorway?

A. Just in the doorway.

Q. In the doorway?

A. Yes.

Q. You were able to see him?

A. I was able to see him. I sat over to the left side of the door there, and the grips were down here (indicating).

Q. Did he say anything to the bellboy on that occasion?

235 A. I didn't hear a word.

Q. No exchange of words?

A. I didn't hear any exchange of words at all.

Q. You just saw the bellboy put them down?

A. That's right.

Q. Did you ever see those grips again?

A. No, I didn't.

Q. May I ask, for what occasion were you in the manager's office?

A. I was making a telephone call.

Q. Your office is upstairs?

A. My office is upstairs, on the mezzanine floor.

Q. And you were making a telephone call in the manager's office?

A. Yes; it was handy to the kitchen; I stepped in to make a call.

Q. You didn't talk to Mr. Danziger?

A. No, I didn't.

Q. But you were able to see him?

A. I was able to see him.

Mr. Van Orman: I think that is all.

236 *Cross Examination by Mr. Bruggeman.*

Q. Mr. Horning, at the time of the incident in question, you had nothing to do with operating the hotel outside of the restaurant; is that correct?

A. The catering, yes, sir.

Q. You happened to be in the office making a personal or business phone call?

A. It was a business call. I was calling about help for a party.

Q. Was that office regularly locked?

A. No.

Q. That office was open for other employees to go in and out, make telephone calls, things like that?

A. They could; it was open; but very seldom anybody goes to Mr. Ryan's desk, only me.

Q. Now, Mr. Horning, you recall when I took your deposition back in November, of 1955?

A. Yes, sir.

Q. I will ask you if I did not ask you these questions at that time, and you make these answers (page 79):

"Q. Just tell me what you saw.

237 "A. Well, I was sitting in the Assistant Manager's chair—desk, after completing a telephone call, and the boy come in with two grips—luggage, two pieces of luggage, set them down, and evidently the man that was—that they belonged to, was with him, he stood in the doorway while he set them down in the rear of the office.

"Q. In other words, you saw the bellman bring in the two cases and put them in the office and some other man come behind him and stopped in the doorway to the office that you were in?

"A. That's right, he stood there and gazed in."

Did I ask you those questions, and did you make those answers?

A. Yes, sir.

Mr. Bruggeman: That is all, your Honor.

(And thereupon the witness was excused.)

238 ROBERT WILLIAM BUSHAW, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Van Orman.

Q. Will you state your name and address, please?

A. Robert William Bushaw; 722 West Wayne.

Q. Fort Wayne, that is?

A. Fort Wayne, yes, sir.

Q. What is your present occupation?

A. I am co-manager of the Hotel Van Orman.

Q. One of the two managers at the hotel; is that correct?

A. That is correct.

Q. Now, on October 25, 1954, what was your occupation?

A. I was assistant manager, one of the assistants.

Q. One of the assistants at the Hotel Van Orman?

A. That's right.

Q. And who was the manager at that time?

A. Harold Van Orman, Jr.

Q. Now, how long have you been employed at the Hotel Van Orman?

A. Some twenty-one or twenty-two years.

239 Q. I am speaking of Fort Wayne.

A. Fort Wayne, I have been here four years.

Q. You have been in the capacity of assistant manager and manager?

A. That is correct.

Q. Prior to that, how long have you been working in the Van Orman system generally?

A. Generally, about twenty-one years

Q. What other cities?

A. Rockford, Illinois, and Evansville, Indiana.

Q. You have been in the hotel business for how long?

A. I would say twenty-five years.

Q. Now, would you explain your duties, what duties you had as assistant manager in October, of 1954?

A. My duties are: I buy the liquor for the hotel, and take care of the Java Shop; and sometimes back of the front desk, helping the clerks.

Q. In general, anything connected with managerial policy; is that correct?

A. That is correct.

Q. Now, I want to get an idea of the hours of work between you and Mr. Ryan, the two assistant managers, at this time in October. Was one of you always available on the floor?

240 A. Yes, one of us; we are around the hotel; I wouldn't say we are on the floor all of the time, but we are around the hotel, where we could be reached.

Q. Well, what hours did you have? Will you explain to the Court what system you had, would you come in, in the morning, and go at night, do you have any idea of what was going on at that time?

A. One day I would come in at 8 in the morning, and leave at 2; come back at 5, and leave at midnight or 1 o'clock. The next day I would come in at 11, and leave at 8 in the evening.

Q. So then between 8 o'clock in the morning and midnight, when the bar closes, there is always either you or Mr. Ryan on duty in the hotel?

A. Yes, that's right.

Q. And that was true in October of 1954?

A. That's right.

Q. And often many hours during the day you both are present?

A. Yes.

Q. Now, in October, 1954, the day of this loss, prior to the loss, I will put it, were you acquainted with Mr. Danziger?

241 A. Not to my knowledge, no.

Q. You didn't know him?

A. No.

Q. Did you ever talk with him?

A. Not that I know of, no.

Q. Now, were you on duty in the afternoon around 4:30 or 5 o'clock, when Mr. Danziger checked in?

A. I was on duty that afternoon, yes.

Q. You were in the hotel?

A. I was in the hotel.

Q. But you did not meet him at that time?

A. No, I did not.

Q. You didn't see him or talk with him?

A. No, sir.

Q. Now, when did you finally meet him?

A. I met Mr. Danziger, I think it was a little after 9 o'clock the next morning.

Q. The following morning. Where did you meet him at that time?

A. In my office.

Q. Was there anyone else there with you?

A. My secretary was in the office at that time.

Q. Would that be Esther Bowley?

A. That's right.

242 Q. Now, what happened when you met him that morning in the office?

A. The bellboy came in, said that he had some cases checked in the office. And I hadn't seen any there, so I said, "It's possible they have been moved to the checkroom. See if they are down in there." So he walked out. And Mr. Danziger came, stood at the door, talking to me; he said, "I checked the cases in here last evening," and he pointed to the spot where the boy had put them.

Q. If I would show you a picture of the manager's office, could you show me where he pointed?

A. Yes, I could.

Q. Now, you are familiar with the manager's office?

A. Yes.

Q. Now, this (Defendant's Exhibit A) is a picture taken from the entrance of doorway which is shown in this picture (Defendant's Exhibit B). You are familiar with that. It shows the manager's desk and the air conditioner.

Would you show me where Mr. Danziger pointed?

A. He pointed right down here (indicating).

Q. What did he say?

A. He said, "The cases were placed right there".

243 Q. He said right between that desk and the air conditioner, between that little desk that has the adding machine on it and the air conditioner?

A. That's right.

Q. He said the cases were placed right there?

A. That's right. There had been two suitcases back there, that some skipper had left at the hotel. We had those in there.

Q. He said he saw the bellboy place the cases there?

A. Yes, sir.

Q. Right between that desk and the air conditioner?

A. Yes.

Q. Did anything else happen that morning?

A. Well, after I talked to Mr. Danziger, I asked him what the value of the cases was, and he said between $60,-

000 and $100,000. I said, "That's an awful amount to be leaving in an office like this". And, after checking several places around the hotel, why, I called the police.

Q. Did you check the checkroom down below?

A. I had the bellboy check the checkroom, and the linen room.

244 Q. There were no traces of them found?

A. No, sir, no traces.

Q. In the checkroom down below, what do you check?

A. The baggage.

Q. The baggage of the guests?

A. Yes.

Q. Now, you did check there with Mr. Danziger?

A. The bellboy checked.

Q. Oh, the bellboy checked?

A. I didn't go to the checkroom. The bellboy checked it.

Q. In your conversation with Mr. Danziger, as best you remember, after you said that was a bad place to leave such a big amount, what did he say, if anything, further?

A. Well, he didn't seem too excited; he said it was going to put him behind; he said he would have to send for more samples.

Q. Then what happened after that, did you call for the police?

A. I called for the police, and they came in, and they talked to Mr. Danziger.

Q. And talked to the various employees?

A. Yes.

245 Q. As far as you know, has anyone ever been apprehended for this theft?

A. No, I don't think anybody has. Nobody from the hotel I know has ever been.

Q. And no trace has been found, that you know of, of the jewelry?

A. No trace of the jewelry, that I know of.

Q. Now, do you have a vault for safekeeping in the hotel?

A. We have a small one back of the desk.

Q. And you had that in October of '54, on the date with which we are concerned?

A. Yes, we did.

Q. What is deposited there?

A. In that vault, it is mostly cash. I don't think we ever had any jewelry put in there, that I know of.

Q. Well, could you have watches and rings?

A. Watches and rings, yes.

Q. What size articles are you thinking of in connection with that safe?

A. Just small articles that you could probably put in an envelope about 4 by 8, something like that.

Q. The contents would be placed in there?

246 A. The contents would be placed in there, yes.

Q. You are thinking of items of a small nature?

A. Of a small nature, that's right.

Q. But you do have a safe in which to keep those?

A. We do have a safe.

Q. Where is that?

A. That is directly back of the room rack.

Q. That works by a key system?

A. Two keys, yes.

Q. That's behind the front desk?

A. Yes, it is.

Q. That is locked at all times?

A. That is locked.

Q. Am I correct, that is never open, it is locked at all times?

A. It is locked at all times.

Q. And the hotel regularly deposits such small items in there, they make it a regular practice?

A. That is a regular practice for small items, yes.

Q. Now, can you describe this vault, as far as size is concerned?

A. Well, to my knowledge, I think it is about 13 inches wide—14 inches wide, and about 15—

247 Q. About 14 by 15?

A. 14 by 15, and about 13 inches deep.

Q. About 13 inches deep?

A. Right.

Q. You would be able to get quite a few items in there?

A. If they were small enough.

Q. Small items, put in individual parcels; is that correct?

A. Yes, sir.

Q. You say that is located back of the desk?

A. Back of the desk.

Q. And you keep it locked?

A. Yes.

Q. And is there any notice to the guests of this vault?

A. The notice is on the registration card.

Q. That is printed at the bottom of the registration card?

A. At the bottom of the registration card, yes.

Q. Which is the registration card, which Mr. Danziger used?

A. Correct.

Q. That is the only notice that you know of?

248 A. That's the only notice that I know of.

Q. So if any particular contents of cases, and so forth, were actually removed from their premises in a case, they could be deposited individually in the safe?

A. Yes, if there weren't too many of them.

Q. How many could it hold, of envelopes?

A. Oh, as far as envelopes, it could hold several of those.

Q. Well, by several, do you mean 100, 200, something like that?

A. Oh, probably 100 would fit in there.

Q. Do you know the dimensions of your manager's office?

A. I believe it is about 9 by 17.

Q. You haven't personally—

A. I never measured it myself, no.

Q. Well, I have 14 by 7; would you say that would be approximately right?

A. It could be that.

Q. That is, 14 feet long and 7 feet wide.

A. Yes.

Q. When you look into the manager's office, that is the width part, that is 7 feet wide?

A. Yes.

249 Q. And the length, which shows where the desk is, is 14?

A. That's right.

Q. Is there any safe or vault in that office?

A. No, there isn't.

Mr. Van Orman: I think that is all.

Cross-Examination by Mr. Bruggeman.

Q. Back in October, 1954, this office that you speak of was pretty much open to anybody who wanted to go in?

A. Well, we never lock it. Traffic isn't too heavy in there. Employees once in a while go in to make a phone call. Of course, people come in to see us when we are in there.

Q. In fact, that night one of the bar men made a phone call, didn't he?

A. Possibly he did.

Q. You don't have an attendant on duty there at all times?

A. Not in the office, not at all times, no, sir.

Q. Back in October, of 1954, did you have any written instructions issued to your employees for the safekeeping of valuables?

250 A. Nothing written, no.

Q. Whatever instructions were given were oral?

A. Yes.

Q. Whose job was it to instruct the bellmen as to what they should do?

A. We have a bell captain, a superintendent of service.

Q. At that time, that was this man, Jack Lindley?

A. Yes.

Q. Whatever instructions were given, he gave the bellmen?

A. He gave the bellmen, yes.

Q. You say you worked for Van Orman at Evansville, at the McCurdy Hotel?

A. Yes.

Q. Do they have a vault there for the keeping of articles?

A. They have a vault back of the desk, a large vault.

Q. That is a vault sufficient to hold cases of this type?

A. Yes, it would be.

Q. Since this occasion in October, of 1954, have you tightened up your regulations and instructions as to

251 the safekeeping of things?

A. Yes, we have tightened up on them.

Mr. Bruggeman: I believe that is all.

Redirect Examination by Mr. Van Orman.

Q. Mr. Bushaw, this manager's office had the sign "Manager's Office" above it?

A. Above it, above the door, that's right.

Q. Even in October, 1954?

A. Oh, yes; it has been there.

Q. When you say "tightened up," what do you mean by that?

A. Well, we have instructed them further to be awfully careful what they take in.

Q. Instructed them on extra care to use at all times?

A. Extra care at all times, that's right.

Mr. Van Orman: That's all.

(And thereupon the witness was excused.)

252 HAROLD W. RYAN, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Van Orman.

Q. Would you state your name and address, please?

A. Harold W. Ryan; 2009 East Columbia Avenue, Fort Wayne, Indiana.

Q. Your occupation, Mr. Ryan?

A. Present occupation, I am one of two managers of the Hotel Van Orman.

Q. And your occupation in October, of 1954, was what?

A. Assistant manager, one of two assistant managers of the Hotel Van Orman.

Q. How long have you been employed at the Hotel Van Orman?

A. Since 1949.

Q. Had you had previous hotel experience?

A. Yes; prior to that, I had worked at the Julian Dubuque Hotel, in Dubuque, Iowa, as room clerk, and at the Hotel Indiana, in Fort Wayne, Indiana.

Q. Your duties as assistant manager at that time, Mr. Ryan, were what?

253 A. Well, supervision of employees, contact with guests, handling correspondence, reservations, credit, cashing checks.

Q. You heard Mr. Bushaw testify about the hours of employment in the hotel. He stated that between 8 o'clock in the morning and midnight at night at least he or you was on duty at all times.

Is that correct?

A. That is correct.

Q. Calling your attention to the date, October 25, 1954, were you on duty in the afternoon when Mr. Danziger checked in?

A. No; on that particular afternoon I was gone from the hotel between the hours of approximately 2 and 5 or 5:30 P. M.

Q. Then you were on from 5 P. M. until approximately—

A. Until one in the morning.

Q. Now, did you have occasion, prior to this, or on October 25th, to have ever met Mr. Danziger, that you know of?

A. My first contact with Mr. Danziger was the following morning.

Q. That was October 26th. You hadn't seen him
254 the day before or talked with him, or anything like that?

A. No, sir, I hadn't.

Q. Your first contact with him, acquaintance with him, or conversation with him, was the following morning?

A. The following morning, after the loss was discovered.

Q. Well, now, when did you first discover the loss?

A. Well, the following day I was called at my residence at approximately 10 o'clock in the morning, wanting to know if I would know anything of the whereabouts of two pieces of luggage or two sample cases that had been set in my office. Mr. Bushaw had called me. I informed him that I had no knowledge, or hadn't seen anything.

And then, of course, I was due at the hotel at approximately 11 o'clock, so when I arrived at the hotel at that time I did speak to Mr. Danziger. And, already, the city detectives were on the scene.

And that was my first contact and knowledge of the disappearance or loss.

Q. Did you know that the grips were even stored in the manager's office?

255 A. No, I had no knowledge of it.

Q. No knowledge of it at all.

A. I never saw them the night previous.

Q. The night previous, when you were in your office from time to time, why, you have no recollection of seeing it at all?

A. No, I don't.

Q. That is really all you know about the disappearance and the circumstances and events leading up to it, what you have just said, that you first learned about it at 10 o'clock, that they were even stored in there, at the same time you learned that they were taken; that is about all of he personal knowledge that you have on it?

A. That's right.

Q. You said you were familiar with the manager's office?

A. Yes.

Q. The picture that has been introduced in evidence, that that was the manager's office.

Are you familiar with the dimensions of that room?

A. Yes.

256 Q. Will you describe it?

A. It is 7 by 14.

Q. What do you have in that room—it consists of one room, does it?

A. It is one room. We have two desks, one the secretary uses, and one that is available for myself and Mr. Bushaw. There is a file cabinet in there, and a coat rack,

and possibly an extra chair. And that's about the extent of it.

Q. There is no safe in that office?

A. No safe in that office.

Q. You say the dimensions are around 14 by 7?

A. That's right.

Q. The picture that I have here (Defendant's Exhibit B) would be a picture of the manager's office; you are familiar with that?

A. Yes.

Q. And the next picture (Defendant's Exhibit A) is a view from the door, of the desk; is that correct?

A. Yes.

Q. Now, have you a safe or vault in the hotel for the safe-keeping of articles?

A. Yes, we have a safe in the front office, im-
257 mediately in the area of the room clerk.

Q. What items do you keep in the safe?

A. Well, that safe is adequate for the personal effects of a guest.

Q. Would you say if the guest had excess money that he wanted to deposit, or rings, or a watch, it would be adequate for that purpose?

A. He could deposit money, personal jewelry, anything of the nature that would go in a vault of that type.

Q. Well, you mean any small articles?

A. Small articles, yes.

Q. What would you say about the dimensions? Mr. Bushaw said they were about 13 by 14 by 15.

A. I know the dimensions. It is 13 by 14 by 15.

Q. Those are the dimensions of the safe?

A. Yes.

Q. So you could take individual items, put them in parcels, put them in the safe?

A. Yes, that's correct.

Q. You heard Mr. Danziger describe his brief cases or sample cases that he had, the two of them, here. Would it have been possible to have stored those in the safe?

258 A. Not the cases; the contents removed, we possibly could.

Q. If you had removed the contents, put them in separate envelopes, then you could?

A. Separate envelopes.

Q. But you couldn't have stored cases of that size?

A. Not in that size safe.

Q. How is this safe locked, is it by keys?

A. It is by keys; there are two keys, a master key and an individual key. It takes both keys to open the lock.

Q. Now, as far as you know, has any trace ever been discovered of where these missing jewels might be, have you heard?

A. Not to my knowledge.

Q. Do you know of anyone that has been apprehended in connection with this loss?

A. Not to my knowledge; no one at the hotel, I know, has been.

Q. Mr. Ryan, you notify guests of this safe on this registration card; is that correct?

A. Yes, on our registration card it says there is a safe provided.

259 Mr. Van Orman: I think that is all, Mr. Ryan.

Cross Examination by Mr. Bruggeman.

Q. Mr. Ryan, this safe that you described would not be adequate to handle some woman's valuable furs, would it?

A. No.

Q. When you went on duty that day, did you go in your office that evening at all?

A. I would say I had. In October, I probably had a hat and coat, walked in, and put them on the coat rack.

Q. What time did you go in there?

A. It was after 5, possibly 5:15, or thereabouts.

Q. Do you recall seeing any cases in there, or any luggage in there, when you went in on that occasion?

A. No, I don't.

Q. While you are on duty, it is possible for other employees and even people who are not employees to go in and out of that room without your observing them?

A. Yes.

260 Q. Do you require your guests to state a value when they deposit something for safe-keeping?

A. Not necessarily.

Q. If they leave it blank, you don't do anything about it?

A. If they just don't wish to declare a value, we don't—that is probably a practice, done about half of the time.

Mr. Bruggeman: I believe that is all.

(And thereupon the witness was excused.)

The Court: How many more witnesses do you have?

Mr. Van Orman: I have one, your Honor, that wasn't there; the last time I checked she was in Decatur on a subpoena.

The Court: I suppose we will have to put this case over until this afternoon. I have something at one o'clock, so I don't think we can get started much before two. I think we better take an adjournment until two o'clock.

(And thereupon a recess was taken until two o'clock in the afternoon.)

261 And at two o'clock in the afternoon of said day, Friday, January 4, 1957, the trial of said cause was resumed, pursuant to adjournment.

Present: The same as before.

The Court: You may proceed.

ESTHER BOWLEY, a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination by Mr. Van Orman.

Q. Would you please tell us your name and address?

A. Esther Bowley; 2906 Smith.

Q. Fort Wayne, Indiana?

A. Fort Wayne, Indiana.

Q. Would you state your occupation?

A. I work at the Hotel Van Orman.

Q. In what capacity?

A. For Mr. Ryan and Mr. Bushaw; secretary.

Q. Calling your attention to the 25th day of October, 1954, were you so employed at the Hotel Van Orman?

A. Yes, sir.

Q. You were their secretary at that time?

262 A. Yes, sir.

Q. How long have you worked for them?

A. Three years.

Q. Now, in October, of 1954, what hours did you work?

A. From 8 to 5.

Q. 8 in the morning until 5 in the evening?

A. Yes, sir.

Q. Now, calling your attention again to this day, October 25, 1954, were you present at the hotel on that occasion?

A. Yes, sir.

Q. Were you present there at the time Mr. Danziger checked in?

A. Yes, sir, I was in the office.

Q. You were in the office, you were in the room called the manager's office?

A. Yes, sir.

Q. Did you talk to Mr. Danziger on that day, did you have occasion to talk to him at all?

A. No, I didn't.

Q. Referring again to this same day when Mr. Danziger checked into the hotel, did you have occasion to see Mr. Danziger?

263 A. Yes; the boy brought the luggage in and put it in our office, and Mr. Horning and I were in there, and he came in the door just, I don't know how many inches it was, I will say a foot; and while the boy put the luggage in there, that's when I saw him; but I did not talk to him.

Q. By "him," you mean Mr. Danziger?

A. Yes, sir.

Q. He came into the entrance, the door, of the manager's office?

A. Yes, sir.

Q. How far did Mr. Danziger come inside the door?

A. I will say twelve inches.

Q. About twelve inches?

A. Yes, sir.

Q. Now, as you walk in the door,—first, where did the bellboy place the bags?

A. Over to the far end is the air conditioner, and he put the luggage by it.

Q. That is, you come to the door, to the right of anybody coming in?

A. Yes.

Q. And over under a post between the air conditioner and a little table, that's where the bellboy placed the 264 bags?

A. Yes, sir, he did.

Q. That was Bloodgood, the bellboy?

A. Yes.

Q. You saw the bellboy place those bags there?

A. Yes, sir.

Q. And then at that same time you saw Mr. Danziger follow the bellboy?

A. Well, he didn't follow him all of the way, no.

Q. He came about twelve inches inside of the door, is that what you said?

A. Yes, sir.

Q. Did Mr. Danziger say anything at the time?

A. No. Mr. Horning and I were in there at the time.

Q. You and Mr. Horning, the catering manager, were in the office at that time?

A. Yes.

Q. Then what happened?

A. He checked the little thing around the handle of the bags, and then he turned around and gave him a little slip.

Q. Bloodgood did, the bellboy?

A. Yes.

Q. The bellboy put the—

265 A. He put the little tickets around the handles.

Q. Around the handle of the bag?

A. Around the handle, attached them somehow; I don't know how he did it.

Q. And then Chuck left, the bellboy left?

A. Yes. I don't know where he went after that.

Q. Did you see Mr. Danziger any more that same day?

A. No.

Q. Now, did you have occasion to see these grips any more that day?

A. Well, when I went—we have a coat rack, and when I went to get my coat to go home, which was about 5, maybe after, I stubbed my toe on one of them.

Q. One of the grips, one of Mr. Danziger's grips?

A. Yes.

Q. That was the last you saw of the grips?

A. Yes.

Q. Now, calling your attention to the next morning, you reported to work at 8 o'clock; it that correct?

A. Yes.

Q. Did you see Mr. Danziger at that time?

A. No, I did not.

Q. Later on in the day, or in the morning, did you see Mr. Danziger?

266 A. It was 9, or after, in that vicinity, and he came in, and a boy was with him, one of the bellboys.

Q. It wasn't the same bellboy this time?

A. No.

Q. He and a bellboy came into the manager's office?

A. Yes; they were looking for the luggage that was placed there the day before, and the luggage wasn't there. They thought they might have taken it downstairs to the bellboys' checkroom, and it wasn't there, either. Mr. Bushaw was there, also. And they wanted to call the police. He was a little hesitant about calling the police right away, so they made some other thorough checks. I believe Mr. Bushaw contacted Mr. Ryan. And then they finally did call the police. And there was a little question about whether Mr. Danziger was followed, and I believe he did mention that he was followed and he lost them.

Q. You mean Mr. Danziger told Mr. Bushaw?

A. On coming to the hotel, I think it was from Michigan, that—

Q. That he was followed?

A. But he lost them on this route that he took.

Q. He indicated that someone was following him?

267 A. Yes.

Q. Do you recall any other conversation that Mr. Danziger and Mr. Bushaw had?

A. There might have been, but I don't remember right now. He mentioned the fact that they were in the office.

Q. Who mentioned the fact?

A. Mr. Danziger mentioned to Mr. Bushaw that they were in the office.

Q. What were in the office?

A. The two bags.

Q. What did he say in this connection?

A. Well, he mentioned that the boy put them over in the corner.

Q. Where did he point—did he poirt, or did he just indicate that the boy put them in the corner?

A. I believe he pointed; I wouldn't be sure.

Q. But you heard Mr. Danziger tell Mr. Bushaw that the bags were in the office?

A. They were placed in the office, yes.

Q. Now, one other question: You have a desk in this manager's office?

A. Yes.

Q. The dimensions of this manager's office, it has
268 been testified, it is about 14 feet in length and 7 feet in width. As far as you know, is that about the approximate size?

A. Yes.

Q. Your desk—

A. Is right by the door.

Q. Is right by the door?

A. Yes.

Q. How far away was your desk where you were seated at this time on the first occasion, the day before, when Mr. Danziger followed the bellboy in, how far away were you from Mr. Danziger?

A. I will say about 24 inches.

Q. Just about two feet, you were that close to him?

A. Yes.

Q. Your desk is right as you enter the door?

A. Yes.

Q. As you go to the right, your desk is to the left, right at the entrance?

A. Yes.

Q. And then as you go to the right, there is the manager's desk, the air conditioner, and so forth?

A. Yes.

Q. The manager's office consists of one room?

269 A. Yes.

Q. Is there any safe or vault in the manager's office, that you know of?

A. No.

Q. Was there at that time?

A. No.

Q. You have nothing to do with any checking of articles at the Van Orman, that is not in your duties?

A. No.

Q. Your duties are secretarial?

A. Yes.

Mr. Van Orman: I think that is all.

Cross-Examination by Mr. Bruggeman.

Q. Your duties consist in typing menus, and things like that?

A. Yes.

Q. At the time Mr. Danziger came up to the door, were you doing your work, typing?

A. I was talking to Mr. Horning; I was kind of turned around.

Q. When you work, you would face the other way?

A. I would face the wall at the time. I have a

270 different desk now. But at the time, my typewriter would face the wall.

Q. While you were typing, your back would be to Mr. Horning?

A. Yes, sir.

Q. And the bellboy?

A. Yes.

Q. At the time you say Mr. Danziger came in the door, did he go in far enough to see Mr. Horning?

A. I believe he could have.

Q. Have you talked to anybody about your testimony today?

A. No, I haven't.

Q. When was the last time you talked to anybody about what you were going to say in this case?

A. I think it was yesterday I read what I previously had said.

Q. The testimony you read over yesterday, I will ask you whether or not I did not ask you this question, and if you did not make this answer:

"Q. At a place where Mr. Danziger could see him put it down?

"A. Oh, yes. Where he was standing I don't believe he could have seen Mr. Horning, but I mean he wasn't
271 that far in the office, I don't believe, but he was right here (indicating), just inside the door."

A. Well, I don't know whether he could have, because, see, we had a cupboard there.

Q. I am just asking you, is that what you testified to before?

A. I could have said so; I don't remember, really. I could have said that, yes.

Q. And that was when your testimony was taken under oath in my office sometime ago?

A. I could have said that.

Q. Now, at the time that testimony was taken, was there anything said by you about the bellboy tying safety deposit slips around the valises in the office?

A. Well, I don't know what he attached; he attached something on there; I don't know what it was.

Q. My question is this, Miss Bowley: At the time you read over your testimony yesterday did you find anything in that testimony about the bellboy tying anything around the valises in the office?

A. No.

Q. That is something that you added today?

A. Well, he had said that. I don't know whether I
272 added it: possibly I had added it.

Q. You knew who had said that?

A. I knew I had seen him attach something, but whether I said it before, or not, I don't know.

Q. Did you talk to Mr. Bushaw about your testimony at all?

A. No, I didn't.

Q. During the time since this incident has happened, have you ever talked to Mr. Bushaw about your testimony?

A. No.

Q. To whom did you talk about your testimony?

A. I think really nobody in particular; I mean, just the incident that happened, and that was it.

Q. When you read it over yesterday, you talked to somebody, didn't you?

A. I discussed it with Mr. Van Orman.

Q. Who else was there at the time?

A. I just believe he and I.

Q. Was that door locked at night?

A. No, sir.

Q. What time did Mr. Ryan come to work that day?

A. I don't remember.

Q. Do you remember him coming in and hanging
273 up his hat and coat?

A. Right offhand, no. If Mr. Bushaw was in early that morning, Mr. Ryan should have come in later on, but I don't know.

Q. That would be before five?

A. Yes.

Q. And you worked until five?

A. Yes, sir.

Q. And when he came to work he would normally hang his hat and coat in your office?

A. Yes, sir.

Q. I just want to ask you one more question. In this testimony that you read over yesterday, didn't Mr. Van Orman ask you this question, and you make this answer:

"Q. He was following the bellman into the room?

"A. Yes, you see my desk is just inside the door and he followed him in there; I mean he didn't follow him right over in the corner but he followed him to the room—or to the office door."

A. Yes.

Mr. Bruggeman: I believe that is all, your Honor.

274 *Redirect Examination by Mr. Van Orman.*

Q. You testified that Mr. Danziger came into your office; you said it couldn't have been more than maybe 12 inches, or a foot; is that what you said?

A. Yes.

Q. He was right inside the door, he wasn't too far in the office?

A. No.

Q. From that view, right at the door of the office, he could see the place where the jewelry was put, I mean where the cases were put?

A. Yes, I don't see any reason why he couldn't.

Q. You wouldn't know exactly whether he was 12 inches in, or 6 inches in, but he was just inside the door?

A. Yes. I am not much on judging sizes.

Mr. Van Orman: That is all.

(And thereupon the witness was excused.)

Mr. Van Orman: The defendant rests, your Honor.

(And here the defendant rested.)

275 And thereupon the plaintiff, in rebuttal, to support and maintain the issues in its behalf, introduced the following evidence:

EDMUND J. DANZIGER, a witness on behalf of the plaintiff in rebuttal, having heretofore been duly sworn, testified as follows:

Direct Examination by Mr. Bruggeman.

Q. You are the same Mr. Danziger who testified earlier this morning?

A. Yes, sir.

Q. After the discovery of this loss, you had some conversations with the police and various people around the hotel?

A. Yes, sir.

Q. In any of those conversations, did you mention about being followed from Michigan?

A. The detective asked me if there was anybody following me from where I left, and I explained to him very positively that nobody follows me because I watch that rear-view mirror like a hawk. If anybody was following me, they wouldn't follow me for long, because the first town I came to I would stop.

Q. Did you have any conversation with Mr. Bushaw
276 about this matter the morning after, while you were investigating, to see what went on?

A. When he came in, I don't recall just what time it was, he came in and spoke to me. He asked me a few questions, and so forth, and he said to me, "Well, I have told Harold Van Orman several times that he should get a safe."

Q. That was that very next morning?

A. The very next morning, when he came in.

Mr. Bruggeman: That is all.

Mr. Van Orman: No questions.

(And thereupon the witness was excused.)

Mr. Bruggeman: We rest, your Honor.

(And here the plaintiff rested, and this was all of the evidence given in said cause.)

* * * * *

296 THE UNITED STATES DISTRICT COURT.

* * (Caption—862) * *

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND JUDGMENT.

(Filed Jan. 29, 1957. Kenneth Lackey, Clerk.)

The above entitled cause came on for trial, and the Court, having duly considered the evidence and being fully advised in the premises, now finds the following:

Findings of Fact.

1. Plaintiff is a corporation organized and existing under the laws of the State of New York and is a citizen of that state. The defendant is a corporation organized and existing under the laws of the State of Indiana and is a citizen of that state. The amount involved in the controversy, exclusive of interest and costs, is more than $3,000.

2. Plaintiff is, and was on October 25, 1954, engaged in the selling of jewelry and gems, at wholesale, through agents in various parts of the United States. The defendant is, and was on said above date, engaged in the business of operating a hotel in the City of Fort Wayne, Indiana, known as the Van Orman.

3. On October 25, 1954, the plaintiff had in its employ one Edmund J. Danziger, a salesman who serviced the territory in and about the City of Fort Wayne, Indiana. He reserved a room for the night of October 25, 1954, at the Van Orman Hotel and arrived on the afternoon of that

297 day. He drove to the Harrison Street entrance of the hotel and gave the doorman his personal luggage. He

kept two bags and carried them into the hotel. The bags contained the jewelry and valuables hereinafter mentioned.

4. Danziger went to the hotel desk-clerk and registered. The registration card had on it the following words:

> "Notice to Guests.
>
> A safe is provided for the deposit of money, jewelry and other valuables. This hotel will not be responsible for valuables not deposited."

After registering Danziger gave the bags or cases containing the jewelry and valuables to a bellboy. Danziger testified he said to the bellboy that he wanted these bags put in a vault; thereupon the bellboy gave him two "deposit slips which I signed and he gave me two receipts." The bellboy, one Bloodgood, testified that the room clerk "informed me he [Danziger] would like to check these two bags for safe deposit * * *. I picked up his key and his rooming slip, asked Miss Ruby for these checks, took him over to the desk and had him sign the two checks and gave them to him." Bloodgood placed the cases in the manager's office next to the hotel desk, and then showed Danziger to his room.

Before leaving for his room Danziger signed the "A Checks" on two Safety Deposit Envelopes. One of these was placed on the handle of each case. The receipts, "B Depositor's Check" were delivered to him. At the time he signed the "A Checks" he did not state the value of the items deposited. The "A Check" attached to the Safety Deposit Envelope had on it the following words:

> "In accepting this envelope and contents for safe keeping, we assume no liability other than that provided for in the Inn Keeper's Act of this state, which has limited our liability so that in no event can we be liable for more than the amount specified in said Act. The employee accepting this envelope has no authority to accept same if the contents are valued at more than the amount specified in said Act."

The hotel had a safe where small articles could be placed, but it was not large enough to hold a sample case or
298 bag such as deposited by Danziger. It had no vault for such purpose. It was the usual practice for the hotel cashier to accept valuables for safekeeping and to issue the deposit slips. The hotel had issued no instructions to its employees not to accept items for deposit or safekeeping over a certain value. As a matter of practice the employees handling property of guests for safekeeping did not require the guests to declare the value of the property so deposited, although at times such inquiry was made; but if the guests did not state the value, the property was nevertheless accepted for safekeeping.

5. On the morning of October 26, 1954, Danziger presented his two deposit slips. It was then discovered that the two sample cases or bags were missing from the place where they were deposited in the manager's room. They have never been located. Presumably they were stolen by unknown persons. The fair and reasonable wholesale value in Fort Wayne, Indiana, of the jewelry and valuables contained in said bags or cases was $29,646.50. The plaintiff was the owner of the jewelry and valuables contained in the missing bags.

Conclusions of Law.

1. The court has jurisdiction of the parties and the subject-matter of this controversy.
2. Law is with the defendant and against the plaintiff.
3. The defendant is entitled to judgment for costs.

OPINION.

Section One of the Indiana Statute governing the liability of hotels for loss of property of guests, Burns Indiana Statutes, Annotated, 1949 Replacement, § 37-105, relates to a hotel guest's personal effects, e. g., money, jewels, orna-

ments, furs, precious stones, articles of silver and gold, "or other valuable property of *small compass.*" (Emphasis Supplied). It is evident that this section was meant to
299 cover the hotel guest's personal effects of "small compass" that could be lodged in a safe as provided by that section, as distinguished from a guest's other personal effects, such as clothing and baggage in the ordinary sense, and also from "merchandise samples or merchandise for sale," to which Sections Two and Three of the Statute, Burns Indiana Statutes, Annotated, §§ 37-106, 37-107 respectively relate.

It can hardly be doubted that the property deposited by Danziger at the hotel was such as is covered by Section Three. The pertinent inquiry is whether the requirements of that section were complied with, and whether the facts take the case out of the statute so as to render the hotel liable other than in accordance with its terms.

Section Three of the statute provides that the hotel shall not be liable for the loss of merchandise samples or merchandise for sale unless the guest or other owner shall give "prior written notice of having brought such merchandise into the hotel and of the value thereof, the receipt of such notice shall have been acknowledged in writing by the proprietor, manager or other agent and in no event shall such liability exceed the sum of four hundred dollars unless the manager or proprietor of such hotel * * * shall have contracted in writing to assume a greater liability." While a signing of the "A Checks" by Danziger may be considered a compliance of giving "prior written notice of having brought such merchandise into the hotel", there was no "written notice of the value thereof", nor did the manager or proprietor of the hotel contract in writing to assume a greater liability than the statutory limit of four hundred dollars.

The plaintiff contends the evidence shows that the hotel

waived the requirement that the specific value of the property be stated and that it had an established practice that its room clerks and other employees were authorized to accept property for safekeeping of a value in excess of the limit of liability fixed by the statute. While the evidence does show that it was the practice of the hotel
300 not to require a guest in all instances to state the value of an item as a condition of its being accepted for safekeeping, the question arises whether this practice, which apparently occurred in the instant case, constituted a waiver by the hotel of Danziger's duty to comply with the terms of the statute.

The "A Check" which Danziger signed contained the specific admonition that the hotel would assume no liability other than that provided for in the Inn Keepers Act of Indiana. Moreover, a space was provided on the "A Check" to indicate the value of the package or other item deposited. Danziger told no one in the hotel of the contents of the bags or of their value. The bags containing the merchandise were of a design or type different from the typical "sample case." The use of this type of bag was deliberate on the part of Danziger in order that their true nature would not be surmised by strangers. Danziger was an experienced traveling salesman. He knew, or should have known, about the requirements of the Indiana statute governing his situation. He had, or should have had, explicit warning of the statute when he signed the "A Checks". All of these facts and circumstances lead to my conclusion that there was no waiver on the part of the hotel. I think, rather, that Danziger was remiss in not complying with the statute by stating on the "A Checks" the value of the bags deposited with the hotel.

But after all, if Danziger had stated the value of the bags, the hotel, under the statute, would only be liable for $400. Had he wanted to hold the hotel liable for a larger

sum, it was encumbent on him to have the manager or proprietor of the hotel "contract in writing to assume a greater liability." The hotel may as a practice have not required its guests to declare a specific value on items deposited for safekeeping and permitted its employees to accept for safekeeping property of guests in the absence of such a declaration. This practice, however, did not
301 constitute, in my opinion, a waiver of the requirement of the guest to obtain a written contract from the manager or proprietor to assume a greater liability than the statutory limit if he desired to hold the hotel liable for more than that limit.

For these reasons I do not think the defendant should be required to pay for the loss sustained by the plaintiff.

Judgment.

Upon the foregoing, findings of fact, conclusions of law and opinion, it is Ordered, Adjudged and Decreed that the plaintiff take nothing from the defendant, and that the defendant have and recover its costs taxed in this action.

Luther M. Swygert.

Judge.

Entered this 28th day of January, 1957,
at Fort Wayne, Indiana.

302 THE UNITED STATES DISTRICT COURT.

* * (Caption—862) * *

MOTION FOR NEW TRIAL.

(Filed Feb. 7, 1957. Kenneth Lackey, Clerk.)

The plaintiff moves the Court for a new trial herein for each of the following reasons:

1. The decision of the Court is contrary to law.

2. The Court erred in failing to impose on defendant the burden of proving compliance with the Inn Keeper's Act. (Acts 1945, Chap. 145.)

3. The Court erred in not stating that Section 3 of the Inn Keeper's Act does not apply to property which the innkeeper accepts for safekeeping.

4. The decision of the Court is not sustained by sufficient evidence.

5. The Court failed to find material facts specially.

6. The Court failed to make any finding on the issue joined on plaintiff's second paragraph of complaint.

7. The Court failed to find what was written on the "B Check" which defendant delivered to Danziger.

8. The Court failed to find that the defendant did not tell Danziger that it had no vault or safe for the deposit of his cases and that its employees had no intention of placing his cases in a vault or safe for safekeeping at the time they issued to him the "B Check" and accepted custody of his cases.

303 9. The Court failed to find that the employees, while accepting custody of the plaintiff's cases, were at all times acting within the scope of their duties as employees of the defendant and were carrying out the instructions which had been given to them by management.

10. The Court failed to find that Danziger was a regular customer of the defendant's hotel, that he was instructed to stay only at hotels which had vaults for the safekeeping of his cases, that he was an old and reliable employee and that he stayed at the defendant's hotel in reliance on its representations that it had a safe to hold his cases and that they would be placed therein.

Barrett, Barrett & McNagny,
Attorneys for Plaintiff.

I hereby certify that I served a copy of the above and foregoing Motion on defendant by mailing to its attorney of record in an envelope properly addressed with postage prepaid this 7th day of February, 1957.

J. A. Bruggeman.

304 THE UNITED STATES DISTRICT COURT.

• • (Caption—862) • •

ORDER.

(Filed Mar. 26, 1957. Kenneth Lackey, Clerk.)

Plaintiff's motion for a new trial is denied.

Enter:

Luther M. Swygert,
Judge.

Hammond, Indiana,
March 26, 1957.

305 THE UNITED STATES DISTRICT COURT.

Northern District of Indiana,

Fort Wayne Division.

Eichberg and Company, Inc.,
vs.
Van Orman Fort Wayne Corporation. } Civil No. 862.

NOTICE OF APPEAL.

(Filed Apr. 9, 1957. Kenneth Lackey, Clerk.)

Notice is hereby given that Eichberg and Company, Inc., plaintiff herein, hereby appeals to the United States Court of Appeals for the 7th Circuit from the judgment duly entered in this action herein on the 29th day of January, 1957, and the denial on March 26, 1957, of plaintiff's motion for a new trial, filed within 10 days after the entry of said judgment.

Barrett, Barrett & McNagny,
J. A. Bruggeman,
By Barrett, Barrett & McNagny,
Attorneys for Plaintiff, Eichberg and Company, Inc.

310 United States of America,
Northern District of Indiana. } ss:

I, Kenneth Lackey, Clerk of the United States District Court in and for the Northern District of Indiana, do hereby certify that the attached pleadings, namely, Complaint, Cost Bond, Summons, Motion to Dismiss Complaint, Order dated October 26, 1955, Defendant's Brief, Plaintiff's Brief, Order dated December 20, 1955, Order dated March 1, 1956, Answer, Second Paragraph of Complaint, Answer to Second Paragraph of Complaint, Suggested Findings of Facts, Defendant's Trial Brief, Findings of Fact, Conclusions of Law, Opinion and Judgment, Motion for New Trial, Order of March 26, 1957, Notice of Appeal, Appeal Bond, Record of Proceedings and Exhibits, are the Originals in Fort Wayne Civil No. 862, Eichberg & Company, Inc., *vs.* Van Orman Fort Wayne Corporation.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Fort Wayne, Indiana, this 7th day of May, 1957.

Kenneth Lackey,
Clerk, U. S. District Court,
By Jane G. Wood,
Deputy Clerk.

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 807

EICHBERG & COMPANY, INC.,
Petitioner,

against

VAN ORMAN FORT WAYNE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE B. WARBURTON,
Counsel for Petitioner,
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New York, N. Y.

J. A. BRUGGEMAN,
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Of Counsel.

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IN THE

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EICHBERG & COMPANY, INC.,

Petitioner,

against

VAN ORMAN FORT WAYNE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming the decision and judgment of the United States District Court for the Northern District of Indiana, Fort Wayne Division, in favor of the defendant after trial.

Opinion Below.

The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, is unreported. The opinion of the United States Court of Appeals for the Seventh Circuit, a copy of which is printed in Appendix A, is reported at 248 F. 2d 758.

Jurisdiction of this Court.

The judgment of the District Court was dated and entered January 28, 1957. The judgment of the Court of Appeals was dated and entered October 22, 1957. The order of the United States Court of Appeals for the Seventh Circuit, denying a petition for rehearing was dated and entered December 4, 1957.

The statutory provision conferring jurisdiction on this Court to review the judgment and decision in question is 28 U. S. C. A. 1254 (1).

Question Presented.

Is the Innkeeper's Statute of Indiana unconstitutional and should the lower courts have made a finding on this issue as well as a finding on each cause of action relied upon by the plaintiff?

Statute Involved.

The case involved Chapter 145, Acts 1945, Indiana Legislature, commonly referred to as the Innkeeper's Statute. It is set forth in Appendix B.

Statement of the Case.

The plaintiff is engaged in the jewelry trade and one of its salesmen, carrying two cases of sample jewelry, registered at a hotel owned by the defendant in Fort Wayne, Indiana, on October 25, 1954. On the registration card which the salesman signed, there was this notation:

> "A safe is provided for the deposit of money, jewelry, and other valuables. This hotel will not be responsible for valuables not deposited."

There was no limitation placed on this card as to the value or size of the property the defendant would accept for safekeeping.

After signing the register, the salesman requested that the two cases be placed in the vault and signed two safety deposit envelopes which were produced by an employee of the hotel.

There was no safe in the hotel sufficiently large in which the two cases could be stored and an employee of the hotel, without the knowledge or consent of the salesman, placed the cases in a room which was open to the public and which was not even locked. When the salesman demanded the return of the cases on the morning of October 26, 1954, they could not be found.

The employees of the hotel, in placing the plaintiff's valuable merchandise in a public room, were merely carrying out the orders of their employer. At no time did the defendant hotel advise plaintiff's employee that it did not intend to place the cases in the safe, that the only safe it had was too small for his sample cases, that the servants of the defendant were not authorized to accept valuables beyond a certain amount, that there was a limit on their authority as to the size of the articles to be accepted or that these valuable cases would be placed in a room which was accessible to the public.

Jurisdiction of the Court of First Instance.

The jurisdiction of the court of first instance lies under 28 U. S. C. A. Section 1332. This suit was commenced on July 27, 1955, by the plaintiff, a New York corporation, against the defendant, an Indiana corporation, for the loss of jewelry valued in excess of $3,000.00.

Argument.

The complaint alleges two causes of action. The first was based on common law bailment[1] and the second sounded in fraud.[2]

The defendant by way of affirmative defenses pleaded the Innkeeper's Statute of Indiana.[3]

This is the first case which required an interpretation of this statute. During the course of the trial by way of oral argument and in its brief the plaintiff contended that the statute was unconstitutional. The same argument was made before the Court of Appeals. However, both courts failed to rule on this issue.

Thus we have before this Court an important question involving property rights and also questions of procedure under the Rules of Civil Procedure.

The defendant contended and the lower courts agreed, that since the plaintiff's salesman had not made known the value of the jewelry at the time he surrendered his cases, it was protected against any loss even occasioned by its own negligence by the Innkeeper's Statute. This indeed is a harsh and seemingly unjust ruling and certainly places innkeepers in a special and protected position. Common carriers, both rail and ocean, which also serve the public, do not receive this consideration but, to the contrary, are prohibited from stipulating their freedom from liability where they are negligent.[4] Warehousemen are likewise governed.[5]

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[1] Folios 1 to 3 of the record below.

[2] Folios 6 to 8 of the record below.

[3] Appendix B hereof.

[4] The Harter Act, 46 U. S. Code 190;
The Carriage of Goods by Sea Act, 46 U. S. Code, 1303 (8);
49 U. S. C. A. Section 20 (11).

[5] General Business Law of New York Section 91.

If the members of the Indiana Legislature had first examined the Bill of Rights of that state, the subject statute certainly would not have been passed in its present form. Section 12 thereof is in direct conflict with the provisions of the statute for it states:

> "SEC. 12. *Courts Open—Due Course of Law—Administration of Justice.*—All courts shall be open, and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law, Justice shall be administered freely, and without purchase; completely, and without denial, speedily, and without delay."

There are not too many cases interpreting Section 12. It is generally read in conjunction with Section 20 which provides as follows:

> "SEC. 20. *Trial by Jury Inviolate in Civil Cases.* In all civil cases, the right of trial by jury shall remain inviolate."

The case of *Warren* v. *Ind. Tel. Co.*, 217 Ind. 93, 26 N. E. 2d 399, clearly and concisely states the attitude of the Indiana courts in protecting the rights of individuals to seek redress from wrongdoers. The highest court in Indiana stated at pages 101-102:

> "These provisions of the Constitution are a part of the fundamental law of the state, declared by the people themselves acting in their sovereign capacity. *Ellingham* v. *Dye* (1913), 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C 200. As such they are entitled to strict construction. *Lafayette, Muncie and Bloomington R. R. Co. and Another* v. *Geiger* (1870), 34 Ind. 185. It has been said that the language of each provision of the Constitution is to be considered as though every word had been hammered into place. *State ex rel. Hovey* v. *Noble* (1888), 118 Ind. 350, 353, 21 N. E. 244.

> "Under the Constitution the right to a jury trial must remain inviolate in civil cases. This guaranty is self-executing and will be enforced independent of statutory enactment. *Schembri* v. *Shearer* (1935), 208 Ind. 97, 194 N. E. 615. But the civil cases referred to have reference only to those actions which were triable by jury at common law. *W. T. Rawleigh Co.* v. *Snider* (1935), 207 Ind. 686, 194 N. E. 356. Actions for injuries to the person caused by the negligence of another were known under the common law of England, and triable by jury. It follows, therefore, that the right to a jury trial in common-law actions for injuries to the person due to negligence is fully protected by Article 1, §20, of our Constitution."

It is submitted that the Innkeeper's Statute as interpreted and applied by the District Court and the Court of Appeals violates the provisions of the Indiana Constitution. On the trial the plaintiff successfully made out a common-law action against the bailee for hire and also proved that the defendant committed a fraud when in consideration of the plaintiff's salesman registering as a guest it promised to store his property in a non-existent safe. Notwithstanding the negligence and fraud of the defendant, the plaintiff was dismissed from court as a wrongdoer and treated as if he were the one who committed the tort.

The courts of many other states have declared statutes unconstitutional where these statutes seek to relieve various departments and persons from liability even though they have been negligent.[6]

One can only conclude that the Indiana Legislature, in passing the Innkeeper's Statute, attempted to grant Innkeepers special privileges and immunities in disregard of

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[6] *Heck* v. *Schupp*, 394 Ill. 296, 68 N. E. 2d 464, 466; *Lebohm* v. *City of Galveston*, 154 Tex. 192, 275 S. W. 2d 951.

the rights of the public in general. This obvious intention is in violation of Section 23 of the Bill of Rights of the Constitution of Indiana, which provides:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The Legislature of Indiana has attempted in the past to grant special privileges to certain classes but without success. In the case of *Hanley* v. *State*, 234 Ind. 326, 123 N. E. 2d 452, a statute granting veterans free hunting licenses was declared unconstitutional because it sought to give special privileges to one class.

The courts of all states are loathe to confer on selected individuals special rights. The reason for this is obvious for such statutes are repugnant to the Constitution (Article 14). This reasoning was clearly set forth by the Supreme Court of the State of Massachusetts in the case of *In re Opinion of the Justices*, 98 N. E. 337. That court overruled an attempt by the Massachusetts Legislature to adopt an act which in effect ruled that no court could entertain an action against a trade union for a tortious act alleged to have been committed on behalf of that union. The Supreme Court said:

> "It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations, other than those named, of the protection of safety, liberty and property which any free government must secure to its sub-

> jects. It takes from them the unhampered right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for the injuries done. It would prevent all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged few therein designated."

Under the common law an innkeeper was an insurer. It may have been proper to adopt a special statute so as to protect an innkeeper from unjust claims for property lost while in the possession of a registered guest. However, we do not think that a statute can be considered constitutional where it places an innkeeper in a more favorable position than other bailees for hire. Certainly the Legislature of Indiana could not have intended that an innkeeper's liability be limited where it has defrauded its guest, as in the case at bar.

Despite its importance, the District Court and the Court of Appeals below failed and refused to consider the constitutionality of the Innkeeper's Statute. In fact, the Court of Appeals based its refusal on the ground, erroneously, we believe, that the constitutionality question had not been properly raised in the District Court.[7]

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[7] "• • • The complaint did not challenge the constitutionality of the Indiana Act. Yet plaintiff tells us of some oral argument, undisclosed by the record, touching on constitutional aspects, which, of course, fails as a method for bringing such question before us on appeal; if indeed constitutional questions can be raised solely by counsel's oral comments in the trial court. In its repiy brief plaintiff's counsel, answering defendant's Point II, states: 'There is nothing in the record to show the position of the plaintiff below on the constitutionality of the statute. Actually we do not know how to include that in the record without printing the briefs filed below and transcribing the oral arguments.' No statement of the points on which plaintiff intended to rely on in this appeal appears of record. See *Federal Rules of Civil Procedure*, Rule 75(d), 28 U. S. C. See also: *Employer's Liability Assurance Corporation* v. *Maryland Casualty Company*, 230 F. 2d 370 (7th Cir. 1956). Exclusion of the constitutional issue leaves the Indiana Act interposed between plaintiff's claim and any recovery of damages."

The plaintiff, in questioning the constitutionality of the statute in oral argument on the trial and in its brief, properly placed this question before the trial court. It was not necessary for the plaintiff to state this issue in the complaint since it was not basing its cause of action thereon.

The procedure followed in this instance by the plaintiff is not unique but, to the contrary, has been recognized for many years. In *Wilder* v. *Reno, Atty. Gen., et al.*, 39 Fed. Supp. 404, the District Court for the Middle District of Pennsylvania held that it was proper to decide the constitutionality of a statute which the plaintiff attacked, even though this point had not been raised in the complaint.

The court stated at page 407:

> "Plaintiff's complaint does not specifically allege unconstitutionality of the state statute, but the constitutional question is inherently involved in the determination of this cause, and both parties have presented arguments on the validity of this act, under the Fourteenth Amendment to the Constitution of the United States. They are aware that the constitutionality of the state statute is in issue, and they expect this court to decide that issue. Under such circumstances, it will be considered before a determination on the merits. • • •"

The *Wilder* case reiterated the principles set forth in *Huff* v. *Selber*, 10 Fed. 2d 236, decided by the District Court for the Western District of Louisiana, Shreveport Division, in 1925.

The leading text authorities are also in agreement with the above decision. *Corpus juris secundum*, Volume 16, Section 96, page 333, states:

> "This is not an inflexible rule, and in some instances constitutional questions inherently involved

> in the determination of the cause may be considered even though they may not have been raised as required by orderly procedure. Also, it is not necessary to the attack of a statute that its unconstitutionality be pleaded, if it has already been held invalid in another case. It has been held that the failure of one suing to enforce certain rights to allege the unconstitutionality of a statute pleaded in bar of such suit does not preclude objection to its constitutionality when so pleaded since anticipation of the defense is unnecessary; * * *"

In fact, the plaintiff technically was prevented from pleading the unconstitutionality of the Innkeeper's Statute by the provisions set forth in the Federal Rules of Civil Procedure. As stated above, the complaint sets forth two causes of action based on (1) bailment and (2) fraud. The defendant raised the Innkeeper's Statute in its answer. According to Rule 7 (a)[8] of the Rules of Civil Procedure these were the only pleadings permitted. The only way that the plaintiff could have successfully set forth this issue in the pleadings would have been to apply to the court for a special order. We submit that this was unnecessary in this instance.

The Court of Appeals also stated that it could not hear this important issue because the plaintiff had not raised it in a statement of points. It is true that no such state-

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[8] "Rule 7. Pleadings Allowed: Form of Motions

(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer. As amended Dec. 27, 1946, effective March 19, 1948."

ment was prepared on behalf of plaintiff but it was precluded from doing so because the appeal was taken under the rules of the Seventh Circuit as promulgated on July 1, 1956 and such a statement was abolished by Rule 12 (h).

Assuming, without conceding, that the plaintiff had not properly raised the constitutional question in the lower court, the Court of Appeals for the Seventh Circuit should have decided the question, especially since it was raised by both the plaintiff and the defendant in their briefs. This appellate court has itself stated that it would look into the applicable law to avoid an erroneous decision where such law had not been insisted upon previously.[9]

In the courts below, the plaintiff strenuously argued that the defendant could seek no solace from the Innkeeper's Statute because it had committed a fraud. The plaintiff proved the five elements necessary to sustain this cause of action. In fact, the defendant practically admitted all the necessary facts. Admittedly the plaintiff's employee requested that his traveling bags be placed in a vault and the defendant's employees stated that this would be done. However, that statement was false and fraudulent. The defendant did not have a vault sufficiently large to contain the cases. This fact was known to the defendant and by relying thereon plaintiff suffered a substantial loss. Neither the District Court nor the Court of Appeals made a specific finding on this cause of action as required by Rule 52 of the Rules of Civil Procedure:

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[9] In *Huntress v. Huntress Estate*, 7 Cir., 1957, 235 F. 2d 205, 209, the court said:

> "Here the parties were given opportunity to present arguments on the point raised, and they have done so. We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties."

"Rule 52. Findings by the Court.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Dec. 27, 1946, effective March 19, 1948.

"(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

In fact, the Court of Appeals stated that such a finding was immaterial.[10]

Rule 52 definitely demands appropriate findings on the second paragraph of the complaint and the failure of the trial court to do so seriously prejudiced the plaintiff's rights. It is submitted that it is not the intent of the Innkeeper's Statute to protect an innkeeper who has perpetrated a fraud on its guest. The failure to make proper findings was urged in the lower court both immediately after trial and thereafter on a motion for a new trial. It was also stressed in the Court of Appeals, both in the original brief and the Petition for Rehearing.

The decision below departed so far from the accepted and usual course of judicial proceedings of a court as to call for a review of the decision when it refused to consider petitioner's case on the merits by an erroneous interpretation of its own rules and a hypertechnical construction of the Federal Rules. The matter was specifically called to the court's attention in the Petition for Rehearing wherein it is pointed out that "Fundamental constitutional rights should not be lost in courts of justice so easily under the Federal Rules." The decision is in direct conflict with

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[10] Appendix B

> "• • • The legal relations between plaintiff and defendant, prevailing at common law between innkeepers and guests, has been so drastically altered and differently defined by the Indiana legislature that both theories undergirding plantiff's complaint fail. See §37-107, *supra*. Consequently those allegations in plaintiff's 'second paragraph,' so-called, sounding in tort were immaterial and undeserving of precise findings of fact in the trial judge's ultimate disposition based squarely on the Indiana legislation. In our view Rule 52, *Federal Rules of Civil Procedure*, 28 U. S. C. has been adequately obeyed and plaintiff's asserted error on that phase of the case is without substance as are all its other points."

your holding in *Conley* v. *Gibson*, 355 U. S. ....., 78 S. Ct. 99, 2 L. ed. 2d 80 at 86, wherein this court said:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: February 10, 1958.

Respectfully submitted,

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Appendix A.

Opinion.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12041. SEPTEMBER TERM AND SESSION, 1957.

EICHBERG & COMPANY, INC.,
Plaintiff-Appellant,

v.

VAN ORMAN FORT WAYNE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

October 22, 1957.

Before FINNEGAN, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

FINNEGAN, Circuit Judge. Missing jewelry valued at $29,646.50 is the reason for this lawsuit. Two bags, or cases, containing these jewels were carried into defendant's hotel by plaintiff's traveling salesman, Danziger, up to the desk where he registered on a card imprinted with this message: "Notice to Guests. A safe is provided for the deposit of money, jewelry and other valuables. This hotel will not be responsible for valuables not deposited." After registering, Danziger handed the two bags in question to defendant's bellboy, saying: "I want these two bags put in the vault." In response the bellboy gave Danziger two Safety Deposit Envelopes, on each of which was printed:

> "In accepting this envelope and contents for safekeeping, we assume no liability other than that

> provided for in the Inn Keepers' Act of this state (Indiana), which has limited our liability so that in no event can we be liable for more than the amount specified in said Act. The employee accepting this envelope has no authority to accept same if the contents are valued at more than the amount specified in said Act."

Danziger signed each envelope below that passage just quoted, omitting, however, to fill in the line for declaration of value. The two receipts were detached, given to Danziger, and the retained parts of the envelopes fastened, one around, each bag handle. They were placed in the manager's office since defendant's hotel safe was not large enough to hold the two bags Danziger parted with while persistently remaining silent as to the contents or value. When he presented his claim stubs the following morning defendant's employees were unable to return the jewelry or bags. Presumably they were stolen by unknown persons. It is undisputed that Danziger believed the hotel had a safe; that his employer, the plaintiff, was a wholesale jeweler and owner of the missing items.

Reversal of the judgment for defendant is asked on several grounds, chief among which are plaintiff's suggested unconstitutionality and inapplicability of the following Indiana statutory provisions[1] to the issues raised by the complaint:

> "37-105. Whenever the proprietor or manger of any hotel, apartment hotel, or inn, shall provide a safe in a convenient place, for the safekeeping of any money, jewels, ornaments, furs, bank notes, bonds, negotiable security, or other valuable papers, precious stones, railroad tickets, articles of silver or gold, or other valuable property of small compass, belonging to or brought in by the guests of such hotel, apartment hotel, or inn, and shall notify the guests thereof by posting a notice in a public and conspicuous

[1] 7 Burns, Indiana Stats Annot. title 37, chap. 1 (1949 Repl. Vol.), §§ 37-105 to 37-107.

place and manner at the place of registration of such hotel, or in each guest room, stating the fact that such safe place is provided in which such articles may be deposited, if such guest shall neglect or fail to deliver such property to the person in charge of such office for deposit in such safe, neither such hotel, apartment hotel, or inn, nor the proprietor nor manager thereof, shall be liable for any loss of or damage to any such property sustained by such guest, or other owner thereof, whether such loss or damage is occasioned by the neglect of such proprietor or manager or of his agents or otherwise. If such guests shall deliver such property to the person in charge of such office for deposit in such safe, such hotels, apartment hotels, or inns, or the manager or proprietor thereof, shall not be liable for the loss or damage of such property sustained by such guest or other owner thereof in any sum exceeding the sum of six hundred dollars ($600), whether such loss or damage is occasioned by the negligence of such proprietor or manager or by his agents or otherwise, notwithstanding said property may be of greater value, unless such proprietor or manager shall have entered into a special agreement in writing agreeing to assume such additional liability."

"37-106. Except as provided for in the foregoing section the hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to personal property, other than merchandise samples or merchandise for sale, brought into such hotel, apartment hotel, or inn by any guest thereof, exceeding two hundred dollars ($200) in value, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless such manager or proprietor shall have contracted in writing to as-

sume greater liability. This limitation of liability shall apply also with respect to the liability for the safekeeping of any luggage or other personal property left in any hotel, apartment hotel, or inn to be checked in any check-room operated by such hotel, apartment hotel, or inn, whether such luggage or other personal property is brought in by and belongs to a guest or to a person who is not a guest."

"37-107. A hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss or damage to any merchandise samples or merchandise for sale, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless the guest or other owner shall have given prior written notice of having brought such merchandise into the hotel and of the value thereof, the receipt of such notice shall have been acknowledged in writing by the proprietor, manager or other agent and in no event shall such liability exceed the sum of four hundred dollars ($400) unless the manager or proprietor of such hotel, apartment hotel, or inn shall have contracted in writing to assume a greater liability."

Faced with an obvious statutory bar, or at least a clear ceiling on dollar liability, plaintiff grounded its complaint on two theories: (1) a common law action against the bailee for hire for failure to deliver the bailed property on demand, and (2) a common law action of deceit arising out of defendant innkeeper's alleged misrepresentation that the bailed property would be put in its vault for safekeeping "when in truth and in fact," plaintiff pleaded, "there was no such vault and there was never any intention to place the property in a vault." The complaint did not challenge the constitutionality of the Indiana Act. Yet plaintiff tells us of some oral argument, undisclosed by the record, touching on constitutional aspects, which,

of course, fails as a method for bringing such question before us on appeal; if indeed constitutional questions can be raised solely by counsel's oral comments in the trial court. In its reply brief plaintiff's counsel, answering defendant's point II, states: "There is nothing in the record to show the position of the plaintiff below on the constitutionality of the statute. Actually we do not know how to include that in the record without printing the briefs filed below and transcribing the oral arguments." No statement of the points on which plaintiff intended to rely on in this appeal appears of record. See *Federal Rules of Civil Procedure*, Rule 75(d), 28 U. S. C. See also: *Employer's Liability Assurance Corporation* v. *Maryland Casualty Company*, 230 F. 2d 370 (7th Cir. 1956). Exclusion of the constitutional issue leaves the Indiana Act interposed between plaintiff's claim and any recovery of damages.

As the record unfolds, it is abundantly clear that plaintiff's salesman was carrying merchandise within the meaning of §37 107 in two cases each about 5" thick and 30" long, "made specially so it wouldn't look like any ordinary jewelry case . . . all . . . [the] cases . . . are made to look a little different." Indeed Danziger also testified: "We just don't want to be so obvious . . . To everybody on the street that we are in the jewelry business." To this should be added his complete nondisclosure of the contents or value to the defendant's staff. This is not a situation of theft by the hotel-keeper from a guest. We think §37-107 was intended to protect innkeepers from undisclosed excessive liability. Imposition of liability on this defendant could only be based upon a written agreement complying with §37-107. *Fisher* v. *Kelsey*, 121 U. S. 383 (1887); See also *Gardner* v. *Jonathan Club*, 217 F. 2d 961 (1950) involving virtually the same form "A and B" checks used by the parties in the case before us. Danziger's undisputed non-compliance with §37-107 cut off that statutory, and only, remedy. The legal relations between plaintiff and

defendant, prevailing at common law between innkeepers and guests, has been so drastically altered and differently defined by the Indiana legislature that both theories undergirding plaintiff's complaint fail. See §37-107, *supra*. Consequently those allegations in plaintiff's "second paragraph," so-called, sounding in tort were immaterial and undeserving of precise findings of fact in the trial judge's ultimate disposition based squarely on the Indiana legislation. In our view Rule 52, *Federal Rules of Civil Procedure*, 28 U. S. C. has been adequately obeyed and plaintiff's asserted error on that phase of the case is without substance as are all its other points.

Plaintiff's motion for a new trial was rightly denied and the judgment appealed is affirmed.

JUDGMENT AFFIRMED.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix B.

Chapter 145, Acts 1945, Indiana Legislature.

37-105. Liability to guests.—Whenever the proprietor or manager of any hotel, apartment hotel, or inn, shall provide a safe in a convenient place for the safekeeping of any money, jewels, ornaments, furs, bank notes, bonds, negotiable security, or other valuable papers, precious stones, railroad tickets, articles of silver or gold, or other valuable property of small compass, belonging to or brought in by the guests of such hotel, apartment hotel, or inn, and shall notify the guests thereof by posting a notice in a public and conspicuous place and manner at the place of registration of such hotel, or in each guest room, stating the fact that such safe place is provided in which such articles may be deposited, if such guest shall neglect or fail to deliver such property to the person in charge of such office for deposit in such safe, neither such hotel, apartment hotel, or inn, nor the proprietor nor manager thereof, shall be liable for any loss of or damage to any such property sustained by such guest, or other owner thereof, whether such loss or damage is occasioned by the neglect of such proprietor or manager or of his agents or otherwise. If such guests shall deliver such property to the person in charge of such office for deposit in such safe, such hotels, apartment hotels, or inns, or the manager or proprietor thereof, shall not be liable for the loss or damage of such property sustained by such guest or other owner thereof in any sum exceeding the sum of six hundred dollars [$600], whether such loss or damage is occasioned by the negligence of such proprietor or manager or by his agents or otherwise, notwithstanding said property may be of greater value, unless such proprietor or manager shall have entered into a special agreement in writing agreeing to assume such additional liability. [Acts 1945, ch. 145, §1, p. 337.]

37-106. Personal property other than merchandise—Checked—Property—Liability.—Except as provided for in

the foregoing section the hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to personal pr· ·erty, other than merchandise samples or merchandise for sale, brought into such hotel, apartment hotel, or inn by any guest thereof exceeding two hundred dollars [$200] in value, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless such manager or proprietor shall have contracted in writing to assume greater liability. This limitation of liability shall apply also with respect to the liability for the safe-keeping of any luggage or other personal property left in any hotel, apartment hotel, or inn to be checked in any check-room operated by such hotel, apartment hotel, or inn, whether such luggage or other personal property is brought in by and belongs to a guest or to a person who is not a g .est. [Acts 1945, ch. 145, §2, p. 337.]

37-107. Merchandise—Liability.—A hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to any merchandise samples or merchandise for sale, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless the guest or other owner shall have given prior written notice of having brought such merchandise into the hotel and of the value thereof, the receipt of such notice shall have been acknowledged in writing by the proprietor, manager or other agent and in no event shall such liability exceed the sum of four hundred dollars [$400] unless the manager or proprietor of such hotel, apartment hotel, or inn shall have contracted in writing to assume a greater liability. [A ·ts 1945, ch. 145, §3, p. 337.]